

THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 22

SUMMER 1955

NUMBER 4

THE CONSTITUTIONAL BASES OF JURISDICTION

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MIGRATORY DIVORCE has given rise to many legal questions. A problem of a significance reaching far beyond the field of divorce and touching upon the very foundation of the federal power to prescribe spatial limits to state jurisdiction in all fields of legislation, adjudication and taxation has been raised by a recent case.¹

In all its dealings with the problem of migratory divorce the Supreme Court of the United States has so far maintained that for a state to have jurisdiction to grant a divorce it is necessary that at least one of the parties to the marriage be a resident of the state.² In cases of migratory

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¹ *Alton v. Alton*, 207 F. 2d 667 (C.A. 3d, 1953).

² Under *Haddock v. Haddock*, 201 U.S. 562 (1906), the action for divorce had to be brought in the state of matrimonial domicile, which, as a general rule, meant the state in which both parties were domiciled. By the Court's decision in *Williams v. North Carolina*, 317 U.S. 287 (1942), the requirement was relaxed so as to let it suffice that one of the parties is a domiciliary of the state. That this requirement was still indispensable for a decree of divorce to be entitled to full faith and credit in other states was pronounced in *Williams v. North Carolina*, 325 U.S. 226 (1945), and *Rice v. Rice*, 336 U.S. 674 (1949). In three additional cases, *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Coe v. Coe*, 334 U.S. 378 (1948); and *Johnson v. Muelberger*, 340 U.S. 581 (1951), it was held that the divorce forum's finding of residence was unassailable in any other state when the defendant had participated in the divorce proceedings. The requirement of a finding of residence by the divorce court has not been affected, however, by these decisions.

While in the cases the jurisdictional requirement is usually expressed by the terms "domicile" and "domiciliary," we shall use in this article the terms "residence" and "resident." At one time the terms domicile and residence referred to different concepts, as they still do in English law. But in this country domicile has to all practical effects assumed the sense of residence. It simply means that state in which the person in question has established the center of his life with an intention to keep it there for an indefinite time. The element of peculiar attachment and permanency which characterizes domicile in the English sense, as well as most of the technicalities concerning loss and reacquisition of the domicile of origin have disappeared from American law. Residence is still different, how-

divorce it has thus been necessary for the plaintiff to swear that he is a resident of the forum state, i.e., a person who has established himself in the state with the intention to remain so established indefinitely. He, or more frequently she, who so swears with the return ticket to the home state in the wallet or handbag, commits perjury. Can a state remove this "necessity of choice between bigamy and perjury"?³ Under the present state of Supreme Court cases it can hardly be said that a decree of divorce rendered by a state of which neither party is a resident is entitled to faith and credit in other states.⁴ But if the parties are not concerned and are content to have in their hands a paper certifying that a divorce has been pronounced by a court of state X, would state X be precluded by the Constitution of the United States from providing proceedings by which such a paper could be obtained? The state of Alabama and the territory of the Virgin Islands have tried to provide such proceedings, but their statutes were respectively held unconstitutional by the Supreme Court of Alabama and the U.S. Court of Appeals for the Third Circuit.⁵ The statute of the Virgin Islands was also held, by the Supreme Court of the United States, to be ultra vires the legislative powers of the territory, which by the Organic Act of 1936 had been limited to "subjects of local application."⁶ The statute which in terms purported to open the divorce court of the territory to non-residents was held to deal with a subject of other than local application.⁷ This decision has, of course, not disposed of the problem of whether or not a statute of this kind is invalid under the Constitution of the United States if it is enacted by a state or by a territory whose legislative powers are not by congressional legislation limited to subjects of local application. Nor has any decision of the United States Supreme Court dealt with the constitutionality of statutes such as that of New York in which the courts of the state are declared to have jurisdiction to dis-

ever, from mere physical presence. For further justification of the elimination from American terminology of the term "domicile," see Rheinstein, *Domicile as Jurisdictional Basis of Divorce Decrees*, 23 Conn. B. J. 280 (1949).

³ This pungent phrase is used by Mr. Justice Clark in his dissenting opinion in *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 28 (1955).

⁴ See authorities cited note 2 *supra*.

⁵ *Jennings v. Jennings*, 251 Ala. 73, 36 So. 2d 236 (1948); *Alton v. Alton*, 207 F. 2d 667 (C.A. 3d, 1953).

⁶ 49 Stat. 1811, 48 U.S.C.A. § 1405r (1952).

⁷ *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955). It will have to be seen whether this decision will mean the end to the divorce business of the Virgin Islands, or merely the resuscitation of the dilemma between bigamy and perjury.

solve any marriage which has been concluded in New York irrespective of where the parties reside at the time of the commencement of the divorce proceedings, or the statute of New Mexico, under which a decree of divorce can be granted to any member of the armed forces who has been stationed in the state continuously for one year, even though he may not be a resident.⁸ This problem requires an investigation of the general meaning of jurisdiction and the basis of the federal power to declare the spatial limits to which state jurisdiction is subject. Such limitations have been frequently asserted to exist, but the constitutional basis of the federal power to determine such limitations has never been fully clarified.

I

In our investigation of the problem we shall start with that case in which the jurisdictional provisions of the divorce act of the Virgin Islands were held to be incompatible with the Constitution of the United States.⁹

On February 10, 1953, Mrs. Sonia Alton, who until then had been a resident of Connecticut, arrived in the Virgin Islands, and exactly six weeks and one day later filed there an action for divorce from her husband upon the ground of "irreconcilable incompatibility of temperament."¹⁰ The defendant husband, without leaving his home in Connecticut, filed, through a Virgin Islands attorney, an entry of general

⁸ Consult:

1) N.Y. Civil Practice Act Ann. § 1147. The statute was enacted some ninety years ago, but does not seem to have been challenged until last year when it was held to be valid by a trial court in *David Zieseniss v. Zieseniss*, 205 Misc. 836, 129 N.Y.S. 2d 649 (1954).

2) N.M. Stat. Ann. (1953) c. 22-7-1 (8). The statute was upheld by the Supreme Court of New Mexico in an opinion in which its compatibility with the constitutional law of the United States was not discussed. *Wilson v. Wilson*, 58 N.M. 411, 272 P. 2d 319 (1954).

⁹ *Alton v. Alton*, 207 F. 2d 667 (C.A. 3d, 1953).

¹⁰ Section 8(7), Bill No. 14, 8th Legislative Assembly of the Virgin Islands, Sess. 1944. Incompatibility of temperament existed as a ground for divorce in the Virgin Islands before they were ceded to the United States by Denmark in 1917. Its role in Danish law is discussed in *Burch v. Burch*, 195 F. 2d 799, 806 (C.A. 3d, 1952).

The notion that incompatibility of temperament should constitute a ground for divorce was developed by the rationalist Natural Law school of the 17th and 18th centuries. Cf. Erle, *Die Ehe im Naturrecht des 17. Jahrhunderts* (1952). The first country in which it found legislative expression seems to have been Prussia, where in 1754 King Frederick II issued an Edict allowing a marriage to be dissolved upon the unilateral application of one party proving that there existed between the parties an insurmountable incompatibility of temperament. The provision was taken over into the Prussian Code of 1794 (*Allgemeines Landrecht für die Preussischen Staaten* §§ 670 et seq., II, 1) and remained in effect until 31 December 1899, when the Prussian Code was replaced by a uniform Civil Code for all Germany.

appearance, waived service of summons, and neither contested the divorce nor participated further in the proceedings. The commissioner to whom the case was referred filed findings of fact and conclusions of law, and recommended that the plaintiff be granted a divorce.

Jurisdiction was stated to exist under the following provisions of the Divorce Act of the Virgin Islands:

Sec. 9(a) . . . If the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district or enters a general appearance in the action, then the court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose.¹¹

In spite of this statute, the District Court for the Territory of the Virgin Islands called upon the plaintiff to produce evidence as to her having established her domicile in the Virgin Islands, and, when no such evidence was produced, dismissed the action. Domicile of at least one party to a divorce suit in the jurisdiction, the court held, is a requirement of federal constitutional law, which cannot be declared by statute to be dispensable. A decree of divorce rendered under such a statute would not be entitled to faith and credit in any other jurisdiction and would be void in the forum itself.¹²

In her appeal to the U.S. Court of Appeals for the Third Circuit, the plaintiff attacked this reasoning and maintained that it was exclusively within the power of the legislature of the forum to determine under what circumstances and to what persons divorces should be granted by its courts, that a divorce granted upon the basis of the forum's statute would be valid within the forum, and that it would be irrelevant for the validity of the decree within the forum whether or not faith and credit would be given to the decree outside of the forum.

This argument was rejected by the Court in a four to three opinion written by Judge Herbert Goodrich,¹³ upon the ground that, unless one of the parties has his domicile in the forum, the rendering of a decree of divorce would "conflict with the due process clause." For that reason the decree would be void in the forum itself, could not have any faith and credit elsewhere, and could not be rendered. Under this argumenta-

¹¹ Bill No. 55, Legislative Assembly of the Virgin Islands, passed May 19, 1953, approved May 29, 1953. On the legislative history, see *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 11 (1955).

¹² *Alton v. Alton*, 121 F. Supp. 878 (D. V.I., 1953).

¹³ *Alton v. Alton*, 207 F. 2d 667 (C.A. 3d, 1953).

tion, the spheres of the full faith and credit clause and the due process clause coincide. A judgment which violates the due process clause is void. Its recognition in other jurisdictions is not only not required but not permissible. On the other hand, it appears to be assumed that every judgment which is valid in the forum state must be given full faith and credit in every other state. It is further assumed that a state's lack of jurisdiction to render a particular judgment necessarily has its basis in the due process clause so that every judgment rendered outside the sphere of the forum's jurisdiction is necessarily void.¹⁴

Are these propositions true? We shall assume that under the present state of Supreme Court decisions a state has no jurisdiction to pronounce a decree of divorce unless at least one party to the marriage has his residence within that state.¹⁵ But does it follow that the rendering of a consent decree to parties neither of whom is a resident would "conflict with the due process clause"? This conclusion might be correct if the due process clause in the 5th and 14th Amendments would read that "no judgment shall be valid if it has been procured in any way other than that of due process of law." But this is not the wording of the due process clauses, which require that "*no person shall be deprived of life, liberty or property without due process of law.*" Neither the clause of the 5th Amendment nor that of the 14th is of any relevance unless it can be said that some person has been, or would be, deprived of life, liberty or property without due process of law. But who could allege to have suffered such a deprivation by consequence of a decree of divorce rendered in consonance with §9(a) of the Divorce Act of the Virgin Islands? Certainly not the plaintiff; she has obtained that freedom from the tie of marriage which she has sought to obtain. And the defendant? By entering a general appearance and choosing not to defend he has at least signified his acquiescence. He has certainly not been deprived of his life. His liberty has been increased rather than taken away from him. The marital status of which he has been freed can by no stretch of the imagination be called property, and such property incidents of marriage as dower or support which he may have lost have not been taken from him "unduly." Even if he might subsequently come to regret his acquiescence in the proceedings, he could not be heard

¹⁴ The writ of certiorari for which Mrs. Alton had petitioned was granted by the Supreme Court, *Alton v. Alton*, 347 U.S. 911 (1954), but when, just before the date set for hearing, Mr. Alton obtained a decree of divorce in Connecticut, the case was closed as having become moot, *Alton v. Alton*, 347 U.S. 610 (1954).

¹⁵ Authorities cited note 2 *supra*.

with such a complaint. Who, we may thus ask, has been deprived of life, liberty or property without due process of law?¹⁶

So thoroughly have we grown accustomed simply to speak of "due process" or "the due process clause" and their violation that we have come to forget the full wording of the clause and to overlook the fact that its application requires that some person be deprived of life, liberty or property. The late Walter Wheeler Cook knew full well why he was so insistent in his warnings against the use of elliptical language.¹⁷

Judge Goodrich's opinion indicates that he must have felt uneasy about the applicability of the due process clause to the Divorce Act of the Virgin Islands. Having stated that "an attempt by another jurisdiction [than that of the domicile] to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question," he continues as follows:

The question may well be asked as to what the lack of due process is. The defendant is not complaining. Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere.¹⁸

Although the question is stated elliptically, we may, perhaps, interpret this passage as indicating that the one who has been deprived of something without due process of law is the state of which one or the other of the parties to the marriage has been a resident. But has that state been deprived of its life, liberty or property? Even if one might say that the state of the residence has been deprived of its liberty to apply its own law and policy to the marital problems of its residents, it would be a novel application of the due process clause to extend its protection to a state. The clause has always been understood to protect the individual against the state, but never to protect the state against the individual. We can safely assume that the Court of Appeals of the Third Circuit would not have held that the Divorce Act of the Virgin Islands violates the due process clause if full attention had been paid to the exact wording of that clause. But would the decision have been necessarily different?

¹⁶ Compare Mr. Justice Clark's dissenting opinion in *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 16 (1955): "[N]either of the Granville-Smiths claim that they have been deprived of life, liberty or property without due process of law. While the State has an interest in the marital relationship, certainly this interest does not come within the protection of the Due Process Clause." *Ibid.*, at 26.

¹⁷ *The Logical and Legal Bases of the Conflict of Laws*, esp. chs. 8, 10 and 12 (1942).

¹⁸ 207 F. 2d 667, 677 (C.A. 3d, 1953).

Assuming that without residence of at least one party no jurisdiction exists, could it be said that in absence of such residence a decree of divorce would be void simply because of the lack of jurisdiction and without any reference to the due process clause?¹⁹ Or should it have been held that, in spite of the lack of jurisdiction, the decree would be valid within the forum even though it would not be entitled to faith and credit elsewhere?²⁰ The answer to these questions depends on what we mean by lack of jurisdiction, and this question, in turn, raises the problem of the basis of all the decisions by which territorial limits have been set to the several states' powers to levy taxes, decide cases, and regulate human conduct.

II

1. Territorial limits to state powers have been asserted by the Supreme Court of the United States as well as by state courts and learned authors of texts.

The problem presented itself first in connection with the territorial limits of a state's judicial powers. Under the full faith and credit clause of Article IV, Section 1, of the Constitution,²¹ and the Act of Congress of 1790,²² enacted thereunder, each state must give full faith and credit to the judgments of the courts of every other state. At an early date, it was maintained and recognized that this provision could not be literally applied. A person who does not reside in state F_1 owns property there, for instance a blanket or a bedstead. Somebody who claims to be a creditor opens proceedings there by attaching the property but without personal service of process upon the alleged debtor. In default proceedings the court of F_1 renders a judgment in personam, enforcement of which is then sought in F_2 . In numerous cases enforcement

¹⁹ Such was the holding of the Supreme Court of Alabama in *Jennings v. Jennings*, 251 Ala. 73, 36 So. 2d 236 (1948); see p. 823 *infra*.

²⁰ In *Sutton v. Leib*, 188 F. 2d 766 (C.A. 7th, 1951), it was held by the Court of Appeals for the Seventh Circuit that a decree of divorce rendered by a Nevada court in a case in which Nevada had no jurisdiction, was nevertheless valid within the State of Nevada; see p. 822 *infra*.

²¹ "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."

²² 1 Stat. 93 (1827), U.S. Rev. Stat. § 905 (1875), U.S. Comp. Stat. 2431 (1916): "And the said records and judicial proceedings . . . authenticated [as stated in the preceding sentence], shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." The version presently in effect is that of Title 28, U.S. Code, § 1738, approved June 25, 1948. In this version, the word "acts" has been inserted before "records and judicial proceedings."

of such a judgment has been held not to be required by the full faith and credit clause.²³ In 1850 the Supreme Court of the United States, in *D'Arcy v. Ketchum*,²⁴ expressed its approval of this restrictive interpretation of the full faith and credit clause. In 1877, it went further and in *Pennoyer v. Neff*²⁵ held that a judgment rendered against a non-resident who had neither been personally served with process nor had submitted to the proceedings could not be treated as a judgment in personam even in the state by whose court it was rendered. A state was held not to have jurisdiction to proceed in personam against such a non-resident.

Also in early times, jurisdictional limitations upon state power came to be maintained in connection with the very topic of divorce. Under what circumstances must one state give faith and credit to a divorce granted by the legislature or the court of another state? Here again, the state courts refused to apply the full faith and credit clause literally. A divorce was held to be entitled to faith and credit only if it was granted by a state having jurisdiction,²⁶ and again, this attitude of the state

²³ Such decisions were already rendered with reference to the full faith and credit clause of the Articles of Confederation, Article 4, which read: "Full faith and credit shall be given in each of these States to the acts, records and judicial proceedings of the courts and magistrates of every other State." This provision was held not to apply to default judgments in personam rendered against non-residents in *Kibbe v. Kibbe*, Kirby's Rep. (Conn.) 119 (1786), and in *Phelps v. Phelps*, 1 Dall. (Pa.) 261, 264 (1788): The Massachusetts proceedings, in which there was rendered the judgment sought to be enforced in Pennsylvania, had been commenced by attaching a blanket allegedly belonging to the defendant. The proceedings, begun by the attachment of a blanket or, as in *Kilburn v. Woodworth*, 5 Johns. (N.Y.) 37 (1809) of a bedstead, prominently figured as horrible precedents in numerous later cases.

Under the domain of the full faith and credit clause of the Constitution, the following cases were decided: *Rogers v. Coleman*, 3 Ky. (Hard.) 413, 415 (1808); *Kilburn v. Woodworth*, 5 Johns. (N.Y.) 37, 41 (1809); *Green v. Sarmiento*, 1 Peters 74 (C.C., Pa., 1810) (*Bushrod Washington, J.*); *Fenton v. Garlick*, 8 Johns. (N.Y.) 194, 197 (1811) (the decision refers to a statute of N.Y., passed on 10 August, 1798, expressly declaring void proceedings of the kind in question); *Bartlet v. Knight*, 1 Mass. 401, 404 (1805); *Bissell v. Briggs*, 9 Mass. 462, 468 (1813); *Aldrich v. Kinney*, 4 Conn. 380, 383 (1822); *Shumway v. Stillman*, 4 Cow. (N.Y.) 292, 294 (1825); *Dennison v. Hyde*, 6 Conn. 508, 517 (1827); *Hall v. Williams*, 6 Pick. (Mass.) 232, 245 (1828); *Miller v. Miller*, 1 Bail. (S.C.) 242, 248 (1829); *Starbuck v. Murray*, 5 Wend. (N.Y.) 148, 156 (1830); *Shumway v. Stillman*, 6 Wend. (N.Y.) 447, 449, 453 (1831); *Hall v. Williams*, 10 Me. 79, 287 (1833); *Wernag v. Pawling*, 5 Gill & J. (Md.) 500, 507 (1833) (dictum); *Whittier v. Wendell*, 7 N.H. 257 (1834); *Wood v. Watkinson*, 17 Conn. 500, 504 (1846); *Pawling v. Bird's Ex'r*, 13 J.R. 192, 6 Wend. (N.Y.) 447, 453 n. (1816).

²⁴ 11 How. (U.S.) 165 (1850).

²⁵ 95 U.S. 714 (1877).

²⁶ 46 such decisions are listed by Chief Justice White in his opinion in *Haddock v. Haddock*, 201 U.S. 562, 586 n. (1906).

courts was approved by the Supreme Court of the United States.²⁷

After it had thus been recognized that the judicial power of the states was limited territorially, the Supreme Court was invoked in numerous cases to decide whether or not a state had judicial jurisdiction in a given situation. Upon the basis of these decisions it is now possible to recognize an elaborate set of rules by which the territorial limits of a state's judicial jurisdiction are determined.²⁸

From the middle of the 19th century on, the Supreme Court had to deal with another kind of alleged territorial limitation of state power. To what extent, if any, may a state levy a tax on property located outside of its territory? In the determination of these limits, the Court has vacillated a great deal, but it has not hesitated to hold that in some manner state power to tax is subject to territorial limits.²⁹

To what extent, if any, may a state regulate, by its law, conduct which is carried on totally or partially outside of its boundaries? In 1897, it was held that the state of Louisiana could not by its statutes prohibit its residents from concluding contracts of insurance outside of the state.³⁰ In 1913, the Court held that the state of South Carolina

²⁷ *Bell v. Bell*, 181 U.S. 175 (1901) (ex parte divorce); *Streitwolf v. Streitwolf*, 181 U.S. 179 (1901) (ex parte divorce); *Andrews v. Andrews*, 188 U.S. 14 (1903) (consent divorce).

The existence of jurisdictional limits to grant divorces is recognized also in those decisions in which the state granting the divorce was held to have acted within its jurisdiction, so that its decree was entitled to full faith and credit: *Cheever v. Wilson*, 9 Wall. (U.S.) 108 (1869); *Cheely v. Clayton*, 110 U.S. 701, 705 (1884); *Maynard v. Hill*, 125 U.S. 190 (1888); *Atherton v. Atherton*, 181 U.S. 155 (1901).

On the general problem of limits to state jurisdiction to grant divorces, see also the dictum by Field, J., in *Pennoyer v. Neff*, 95 U.S. 714 (1877); the Report of the Commissioners of Massachusetts, accompanying the Statute of 1835, as cited by White, C. J., in *Haddock v. Haddock*, 201 U.S. 562, 588 (1906); and the general discussion in Bishop's *Commentaries on the Law of Marriage and Divorce*, Book II (1st ed., 1864).

²⁸ *Divorce: Haddock v. Haddock*, 201 U.S. 562 (1906); *Williams v. North Carolina*, 317 U.S. 287 (1942); *Williams v. North Carolina*, 325 U.S. 226 (1945); *Rice v. Rice*, 336 U.S. 674 (1949); see also *Davis v. Davis*, 305 U.S. 32 (1938); *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Coe v. Coe*, 334 U.S. 378 (1948); *Johnson v. Muelberger*, 340 U.S. 581 (1951); *Cook v. Cook*, 342 U.S. 126 (1951).

As to the limits upon other kinds of judicial jurisdiction, see Rest., *Conflict of Laws* c. 4 (1934); 1 Beale, *Conflict of Laws* c. 4 (1935); Goodrich, *Conflict of Laws* 166 et seq. (3d ed., 1949); Stumberg, *Conflict of Laws* 69 et seq. (2d ed., 1951).

²⁹ See *Bruton*, *Cases on Taxation* 59 et seq. (2d ed., 1949 revision); 1 Beale, *Conflict of Laws* c. 4A (1935); Goodrich, *Conflict of Laws* 97 et seq. (3d ed., 1949).

³⁰ *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). See also *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924); *Hartford Accident and Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1933); *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936).

could not impose damages upon a corporation for conduct which had caused harm to another but was carried on outside of the state.³¹ In 1932, it was decided that in a situation in which a workman employed in state A to do work in states A and B was injured in B, the application of the workman's compensation law of B was improper.³² There have been additional cases dealing with the proper territorial limits of the application of a state's substantive law.³³ While it is difficult to recognize behind such cases a coherent pattern as to how these limits are to be drawn,³⁴ and while there are other decisions of the Court which seem to indicate that the states are free to determine for themselves their choice of law rules,³⁵ the fact remains that in a considerable number of cases the Court has proceeded upon the assumption that territorial limits are set to the regulatory power of each state.

Although the Supreme Court has not always used the term *jurisdiction* in referring to these questions, it has become customary in legal writing to treat the problems under this heading and thus to speak of jurisdiction to act judicially, to tax, and to legislate.³⁶ But what are the bases for the rules by which such jurisdiction is held to be limited? In this connection we must recognize that jurisdictional limits may be of a twofold character: they may be imposed by a state or nation upon itself, or they may be imposed upon it by a legal order higher than that of the state or nation. By its own law the state of Illinois has limited the jurisdiction of its courts to proceed in actions in personam to cases in which service of process can be had upon the defendant either personally or by handing a summons to a member of his household.³⁷ Also

³¹ *Western Union Telegraph Co. v. Brown*, 234 U.S. 542 (1914); see also *Western Union Telegraph Co. v. Chiles*, 214 U.S. 274 (1909).

³² *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932).

³³ See Stumberg, *Conflict of Laws* 54 (3d ed., 1951); Goodrich, *Conflict of Laws* 31 (3d ed., 1949); Cheatham, *A Federal Nation and Conflict of Laws*, 22 *Rocky Mt. L. Rev.* 109 (1950); Rheinstein, *Das Kollisionsrecht im System des Verfassungsrechts der Vereinigten Staaten von Amerika*, 1 *Festschrift für Ernst Rabel* 539 (1953).

³⁴ "Nowhere has the Court attempted, although faith and credit opinions have been written by some of its boldest-thinking and clearest-speaking Justices, to define standards. . . . Nor can I discern any consistent pattern or design into which the cases fit.

Indeed, I think it difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards." Robert H. Jackson, *Full Faith and Credit—the Lawyer's Clause of the Constitution*, 45 *Col. L. Rev.* 1, 16 (1945).

³⁵ *Kryger v. Wilson*, 242 U.S. 171 (1916); *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941).

³⁶ Cf. authorities cited notes 28, 29 and 33 *supra*.

³⁷ *Ill. Rev. Stat.* (1948) c. 110, §§ 137, 138.

by its own law the United States has limited the application of most, although not all, its criminal statutes to acts committed within the boundaries of the United States.³⁸ With such self-imposed limitations of jurisdiction we are not concerned in this article. We shall rather deal with those limits of jurisdiction which are said to be imposed upon the several states of the Union in some way other than by their own respective laws. The statement of the rules by which such limitations of state jurisdictions are defined will, of course, be sought in the Constitution of the United States. Nowhere, however, in that document can we find any clause which by clear words defines the territorial limits of state jurisdiction so as to apply to all the situations in question. Where, then, can we find the source from which these limits are derived?

At the very outset it must be observed that no statement of territorial limitation of state jurisdiction can be found in the text of the full faith and credit clause. This clause simply says that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."³⁹ As we have seen, the clause is not being applied as it is written. In connection with judicial proceedings, the restriction has been read into the text that the command of full faith and credit does not apply unless the state in which the judicial proceedings were carried on had jurisdiction to do so. But how do we know whether that state had jurisdiction? The constitutional clause does not tell us. Under the second sentence of the clause the Congress appears to have the power to articulate the rules by which state jurisdiction is defined.⁴⁰ But in the statutes which Congress has so far enacted by virtue of the empowerment of the full faith and credit clause of the Constitution,⁴¹ it has refrained from articulating any definitions of state jurisdiction. Yet, both state courts and the Supreme Court of the United States have consistently proceeded upon the assumption that judicial jurisdiction of the states is territorially limited, that these limits are established somewhere in the law, and that, upon

³⁸ See Stimson, *Conflict of Criminal Laws* (1936).

³⁹ U.S. Constitution Art. 4, § 1.

⁴⁰ "And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." See W. W. Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 *Yale L. J.* 421 (1919), repr. *The Logical and Legal Bases of the Conflict of Laws* c. IV (1942); Robert H. Jackson, *Full Faith and Credit—the Lawyer's Clause of the Constitution*, 45 *Col. L. Rev.* 1, 21 (1945); W. W. Crosskey, *Politics and the Constitution* 541 (1953).

⁴¹ Act of 1790, 1 Stat. 93 (1827); see authorities cited note 2 *supra*; Act of 1804, 2 Stat. 547 (1856), now 28 U.S.C.A. 1739 (1948).

such legal basis, they can be articulated by the courts.⁴² Only upon this assumption was it at all possible in a workable manner to apply the full faith and credit clause to "judicial proceedings."

No generally workable approach has been elaborated, however, in connection with the applicability of the full faith and credit clause to the substantive law of the states. While it has been alleged repeatedly that that clause compels each state to give full faith and credit to the substantive law of every other,⁴³ the Supreme Court has applied the clause in this sense only in a small number of cases, which can all be grouped under the following five headings. In a series of cases it has been consistently held by the Court that in determining questions arising out of the relationship between a fraternal benefit society and its members, the full faith and credit clause requires all states to apply the law of that state under which the fraternal benefit society has been incorporated.⁴⁴ In one case, the full faith and credit clause was used to reach a result which was in other cases reached by means of the due process clause of the 14th Amendment, viz., that of compelling a state to decide controversies arising out of a contract of insurance under the law of the state in which the contract was concluded.⁴⁵ In two cases the clause was used to compel a state to open its courts to actions for wrongful death created by another state in which the death-causing accident occurred.⁴⁶ There is, furthermore, a group of cases in which it was held

⁴² The only intimation that a particular jurisdictional limit on state power may not be based upon legal principles which, although they require judicial articulation, are already contained in the Constitution, may, perhaps, be found in the following passage of Mr. Justice Rutledge's dissenting opinion in *Williams v. North Carolina*, 325 U.S. 226, 255 (1945): "The Constitution does not mention domicile. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common-law conception. Judges have imported it."

⁴³ Cf. Jackson, *op. cit. supra* note 34; E. M. Dodd, Jr., *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 *Harv. L. Rev.* 533 (1926); Moore and Oglebay, *The Supreme Court and Full Faith and Credit*, 29 *Va. L. Rev.* 557 (1943); Hilpert and Cooley, *The Federal Constitution and the Choice of Law*, 25 *Wash. U.L.Q.* 27 (1939); Crosskey, *1 Politics and the Constitution* 542 (1953); Childs, *Full Faith and Credit: the Lawyer's Clause*, 36 *Ky. L.J.* 30 (1947); Corwin, *The Full Faith and Credit Clause*, 81 *U. of Pa. L. Rev.* 371 (1933); Costigan, *Article IV, Section 1, of the Constitution*, 4 *Col. L. Rev.* 470 (1904); Page, *Full Faith and Credit: the Discarded Constitutional Provision*, [1948] *Wis. L. Rev.* 261; Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 *Ill. L. Rev.* 1 (1944); Ross, *Full Faith and Credit in a Federal System*, 20 *Minn. L. Rev.* 140 (1936).

⁴⁴ *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915); *Modern Woodmen of America v. Mixer*, 267 U.S. 544 (1925); *Sovereign Camp v. Bolin*, 305 U.S. 66 (1938); *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947).

⁴⁵ *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936).

⁴⁶ *Hughes v. Fetter*, 341 U.S. 609 (1951); *First National Bank of Chicago v. United Air Lines*, 342 U.S. 396 (1952).

that each state must enforce the liability of stockholders of a banking corporation as established by the state of incorporation.⁴⁷ In all the cases of this last named group, the liability of the stockholders had been established by a decree of a court of the state of incorporation. The full faith and credit clause thus applied in its undoubted reference to "judicial proceedings,"⁴⁸ but, nevertheless, the Court spoke of the faith and credit due not only to the judicial decree, but also to the statute upon the basis of which the judicial decree was rendered. Finally, there is the isolated case of *Bradford Electric Power Co. v. Clapper*,⁴⁹ in which it was held that under the full faith and credit clause, the federal District Court for New Hampshire had to apply the Workmen's Compensation Law of Vermont rather than that of New Hampshire to the claim of the widow of a lineman who resided in Vermont, was employed by a Vermont corporation under a contract made in Vermont, and was killed while working for the corporation in New Hampshire. Beyond this narrow scope of situations, the Supreme Court has not applied the full faith and credit clause to problems of legislative jurisdiction.

This reluctance can be explained upon two grounds. First, it is not certain whether or not the full faith and credit clause applies to substantive law at all. It is not clear what is meant by the command that full faith and credit is to be given to the "*public Acts [and] Records*" of each state in every other. What are the "public acts and records" of a state? Good, indeed almost convincing, reasons have been adduced for the fact that by "public acts" the framers of the full faith and credit clause of the Constitution and of the Articles of Confederation, by which it was preceded, meant to refer to state statutes.⁵⁰ If this is correct, a puzzling problem seems to arise, viz. the problem of why faith and credit is to be given to state law only insofar as it appears in the form of statute law but not insofar as it appears as case law. Professor Crosskey's argument that the cases in which a state's unwritten law is expressed are referred to in the text of the full faith and credit clause by the term "records"⁵¹ has been doubted.⁵² The argument is thorough-

⁴⁷ *Finney v. Gay*, 189 U.S. 335 (1903); *Converse v. Hamilton*, 224 U.S. 243 (1912); *Broderick v. Rosner*, 294 U.S. 629 (1935).

⁴⁸ Cf. *Rheinstein*, op. cit. supra note 33 at 561.

⁴⁹ 286 U.S. 145 (1932).

⁵⁰ See Crosskey, op. cit. supra note 43.

⁵¹ *Ibid.*, at 546.

⁵² Yntema, Review of Crosskey, Politics and the Constitution, 2 Am. J. Compar. L. 582, 586 (1953).

ly plausible, however, that the fathers of the Constitution regarded the Common Law of the several states as, indeed, a common law, i.e., a law which was common to all.⁵³ While its interpretation might well differ among various courts, it would always be the same law which they were trying to understand and apply, so that there would not exist any need for commanding any state to give faith and credit to the common law of any other. We shall see later in this article that the notion of strictly separate and different common laws of the several states, which is regarded as axiomatic by the Supreme Court in its decision in *Erie Railroad v. Tompkins*,⁵⁴ was alien to those earlier generations whose notions of the nature of the Common Law as a law common to all the states had found apt expression in Judge Story's opinion in *Swift v. Tyson*.⁵⁵ The text of the full faith and credit clause would thus not seem to stand in the way of applying the command of faith and credit to state statutes or, perhaps, to all state substantive law. That the clause has nevertheless not been generally applied in this way has its reason in another fact, pointed out by Chief Justice Stone in *Alaska Packers' Co. v. Industrial Commission of California*.⁵⁶ If the clause were to be applied literally in every case having contacts with two states, whichever of the two happens to be the forum would always have to apply the law of the other.⁵⁷ If, however, a third state happens to be the forum, the clause would give it no guidance as to which of the two other states' law is entitled to faith and credit. In the one case the clause would thus require an absurd result and in the second none at all, unless it were supplemented by a set of rules indicating which state has legislative jurisdiction. Such a set of rules would be none other than a full-fledged system of conflict of laws, which would thus, via the full faith and credit

⁵³ Cf. Crosskey, op. cit. supra note 43, in chapter XVIII. In his elaborate review of Professor Crosskey's book [Ex parte Clio, 54 Col. L. Rev. 450 (1954)] Professor Goebel tries to show that the thirteen colonies did not have a common customary law. To what extent, if any, this assertion is correct, seems to reduce itself to a question of terminology. Neither in the review nor in the other writings of Professor Goebel and his school can there be found a refutation of the view that the makers of the Constitution regarded the Common Law as a law which all states had in common. That it would, indeed, be difficult to imagine that men of the late 18th century could have held any other view, will, it is hoped, be apparent from what is said infra, at p. 814 et seq.; see also the review of Goebel's review by Petro, 53 Mich. L. Rev. 312, 324 (1954).

⁵⁴ 304 U.S. 64 (1938).

⁵⁵ 16 Pet. (U.S.) 1 (1842).

⁵⁶ 294 U.S. 532, 547 (1934).

⁵⁷ "A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, whenever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." Ibid., at 547.

clause, become a part of the Constitution of the United States. Such a result would be viewed with dismay and would be difficult to reconcile with those cases in which the Supreme Court has held that conflicts law is state law, the alleged violation of which does not raise a federal constitutional issue,⁵⁸ and which is to be applied by federal courts in diversity of citizenship cases.⁵⁹ These cases cannot, of course, be reconciled with those mentioned before in which it was held that the full faith and credit clause is violated by the failure of a state in certain situations to apply the statute of another state. The co-existence of these two sets of conflicting decisions illustrates the uncertainty which presently exists about the bases of jurisdictional rules.

If any search at all is made for the basis of these rules, it is at this time predominantly found in the due process clause of the 14th Amendment.⁶⁰ This view has resulted in a retrenchment of the Supreme Court's once bolder efforts to establish a full fledged system of jurisdictional rules. During the second administration of Franklin D. Roosevelt, criticism of the Court's hostility to social and New Deal legislation reached such a pitch that the President proposed to change radically the composition of the Supreme Court, and the Court thus inevitably modified its approach.⁶¹ It did so by discarding the concept of substantive due process, which it had so often used to reach its now abandoned results. The same concept had also been used to furnish the basis of some of the Court's jurisdictional holdings. When substantive due process was branded as an insufficient basis for the Court's decisions on social legislation and similar matters, it also appeared to be no longer usable in jurisdiction cases. With respect to regulation of activities by substantive law, it now became permissible to apply regulatory laws to activities which formerly would have been held to be "extra-territorial" and thus outside of the sphere of jurisdiction.⁶² Limitations once established

⁵⁸ *Kryger v. Wilson*, 242 U.S. 171 (1916).

⁵⁹ *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941).

⁶⁰ Compare *Overton*, *State Decisions in Conflict of Laws and Review by the United States Supreme Court under the Due Process Clause*, 22 Ore. L. Rev. 109 (1943), and writings cited note 33 *supra*.

⁶¹ *Rheinstein*, *op. cit. supra* note 33 at 572; R. J. Harris, *The Judicial Power of the United States* (1940); E. S. Corwin, *Constitutional Revolution Ltd.* (1941); R. Jackson, *The Struggle for Judicial Supremacy* (1941); R. K. Carr, *Democracy and the Supreme Court* (1936).

⁶² *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201 (1941); *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313 (1943); *Travelers Health Association v. Commonwealth of Virginia*, 339 U.S. 643 (1950).

on state jurisdiction to tax were also abandoned,⁶³ and the lines by which judicial jurisdiction had appeared to be firmly limited were softened so as to make the limits of judicial jurisdiction appear to be founded on that concept of procedural due process to which the Court continued to adhere.⁶⁴ In the tax field, the door was thus opened to overlapping taxation, and even in flagrant cases the Supreme Court refused to interfere,⁶⁵ apparently believing that after the explosion of the concept of substantive due process, no basis was left for holding that the taxing power of a state was subject to territorial limits. All the new cases, it is true, were limited to the taxation of intangibles, and it is significant that in spite of the Supreme Court's new latitude, no state so far seems to have tried to impose a property tax upon tangibles physically located outside of its boundaries.⁶⁶ It is also significant that on the same day on which it had rendered a decision radically freeing the states from territorial limitations of their power to tax intangibles,⁶⁷ the Court, as if nothing had happened, rendered another decision continuing its line of cases by which all states are held in matters concerning fraternal benefit societies to apply exclusively the law of the state where the association has been incorporated.⁶⁸ Since in the latter case no constitutional clause other than that of Article IV, Section 1, was mentioned, the Court apparently remained unaware of the contradiction of that decision with the one which it rendered in the tax case. Unawareness of such contradiction is only possible, however, if one regards the full faith and credit clause as capable of being applied without a supplementary set of jurisdictional rules, which, as we have seen, is not feasible.

⁶³ See, especially, *Curry v. McCaless*, 307 U.S. 357 (1939); *Graves v. Elliott*, 307 U.S. 383 (1939); *Graves v. Schmidlapp*, 315 U.S. 657 (1942); *State Tax Com. of Utah v. Aldrich*, 316 U.S. 174 (1942); *Greenough v. Tax Assessors of Newport*, 331 U.S. 486 (1947).

⁶⁴ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); cf. Comment, 16 U. of Chi. L. Rev. 523 (1949).

⁶⁵ See *Hill v. Martin*, 296 U.S. 393 (1935); *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937); but see *Texas v. Florida*, 306 U.S. 398 (1939); Consult *Tweed and Sargent, Death and Taxes are Certain—But What of Domicile*, 53 Harv. L. Rev. 68 (1939).

⁶⁶ In *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905), the Supreme Court emphatically confirmed the principle, expressed already in a constant line of earlier cases, that no property tax could properly be levied upon tangible property (movable or immovable) by any state other than that in which the property sought to be taxed is physically located. It seems that so far no state has provoked litigation in which the continued validity of this principle could have been questioned.

⁶⁷ *Greenough v. Tax Assessors of Newport*, 331 U.S. 486 (1947).

⁶⁸ *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947).

The Supreme Court's retrenchment in connection with problems of jurisdiction would, of course, have been necessary, if territorial limits of state jurisdiction really have their basis in the due process clause of the 14th Amendment. That this clause cannot be the basis is shown, however, by two facts: jurisdictional limitations were held to exist long before the 14th Amendment was adopted, and they were and still are applied in cases of consent divorces, where nobody is being deprived of life, liberty or property. Where then have the bases of these limitations been found?

2. For many of the cases which antedate the 28th of July 1868, the day on which the 14th Amendment became effective, that attitude is characteristic which was expressed by Mr. Justice Field when, in the *Case of the State Tax on Foreign-Held Bonds*, he said:

Property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, *it would seem that no adjudication should be necessary to establish so obvious a proposition.* The power of taxation . . . is necessarily limited to . . . persons, property, and business . . . within her jurisdiction.⁶⁹

That the taxing power of a state is limited to objects situated within its territory—this, indeed, is the meaning of jurisdiction as used by Mr. Justice Field—is a self-evident proposition for which it is not necessary to state any source or basis. The proposition, it seems, is not so much a rule of law for which it would be necessary to state a source of authority, but an immutable principle, of which, unfortunately, we are not told whether it belongs to the realm of nature or of logic.

In this view that certain jurisdictional limitations are so obvious that their pronouncement does not require the statement of any authority, Mr. Justice Field did by no means stand alone. All those cases in which the Supreme Court discussed the problem of alleged territorial limitations of a state's taxing power before the enactment of the 14th Amendment and the discovery that the due process clause might be used for the purpose⁷⁰ were disposed of in this apodictical way.⁷¹ The only place

⁶⁹ 15 Wall. (U.S.) 300, 319 (1872).

⁷⁰ The earliest case expressly referring to the due process clause of the 14th Amendment as limiting a state's territorial jurisdiction to tax is *Louisville and Jeffersonville Ferry Co. v. Kentucky*, 188 U.S. 385, 398 (1903) (Harlan, J.).

⁷¹ *Hays v. Pacific Mail S.S. Co.*, 17 How. (U.S.) 596, 598 (1854) (per Nelson, J.): California's attempt to levy a property tax upon ships registered in New York was held to be inadmissible. "[T]he state of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the state."

Railroad Co. v. Jackson, 7 Wall. (U.S.) 262, 267 (1868): Pennsylvania attempted to

in which a slightly different note was sounded was Chief Justice White's dissenting opinion in *Adams Express Co. v. Ohio*,⁷² where we find not only an allusion to the fact that jurisdictional limitations are common to all nations but, more particularly, a clear expression of the necessity that in a federal union all member states must be subject to such limitations as are required by the need for mutual accommodation.⁷³

Apodictical statements to the effect that a state has no jurisdiction to, or, more simply, "cannot" render a judgment in personam against a non-resident defendant who has neither been personally served with process nor consented to the proceedings, are contained in most of the state court decisions⁷⁴ which were rendered before the problem was laid at rest by the United States Supreme Court's decisions in *D'Arcy v. Ketchum*⁷⁵ and *Pennoyer v. Neff*.⁷⁶ In another group of such cases the due process clause of the 14th Amendment is anticipated in a remarkable way: the proceedings in which the sister state's judgment has been rendered are so unfair that not even the full faith and credit clause of

tax the total interest payments on bonds issued by a railroad company owning track in both Pennsylvania and Maryland. In holding such a tax inadmissible, Mr. Justice Nelson said: "Now, it is apparent, if the State of Pennsylvania is at liberty to tax these bonds, that, to the extent of this Maryland portion of the road, she is taxing property and interests beyond her jurisdiction."

St. Louis v. The Ferry Co., 11 Wall. (U.S.) 423, 429-30 (1870): attempt by Missouri to levy a tax on ferry boats having their home port on the Illinois side of the Mississippi River was held unconstitutional, since the ships do not have their situs in Missouri (per Swayne, J.). *Morgan v. Parham*, 16 Wall. (U.S.) 472 (1872): a ship cannot be taxed by any state other than that of the home port.

In *Adams Express Co. v. Ohio*, 165 U.S. 194 (1897), a state tax on a part of the rolling stock of an express company was upheld with the simple statement that "the property taxed has its actual situs in the state and is, therefore, subject to the taxation."

⁷² 165 U.S. 194, 230: "It is elementary that the taxing power of one government cannot be lawfully exerted over property not within its jurisdiction or territory and within the jurisdiction and territory of another. The attempted exercise of such power would be a clear usurpation of authority, and involve a denial of the most obvious conceptions of government. This rule, common to all jurisdictions, is particularly applicable to the several States of the Union, as they are by the Constitution confined within the orbit of their lawful authority, which they cannot transcend without destroying the legitimate powers of each other, and, therefore, without violating the Constitution of the United States."

⁷³ Simply apodictical statements are given in the treatises on taxation: Burroughs 40 (1877); 18 Cooley 55 (2d ed., 1886); and 19 Judson 482 (2d ed., 1917); cf. Bruton, Cases and Materials on Taxation 59 (2d ed., 1949 rev.).

⁷⁴ *Fenton v. Garlick*, 8 Johns. (N.Y.) 194, 197 (1811); *Bissell v. Briggs*, 9 Mass. 462, 468 (1813); *Shumway v. Stillman*, 4 Cow. (N.Y.) 292, 294 (1825); *Miller v. Miller*, 1 Bail. (S.C.) 242, 248 (1829); *Shumway v. Stillman*, 6 Wend. (N.Y.) 447, 449, 453 (1831); *Hall v. Williams*, 10 Me. 78, 287 (1833); *Wernwag v. Pawling*, 5 Gill & J. (Md.) 500, 507 (1833); *Whittier v. Wendell*, 7 N.H. 257 (1834); *Wood v. Watkinson*, 17 Conn. 500 (1846).

⁷⁵ 11 How. (U.S.) 165 (1850).

⁷⁶ 95 U.S. 714 (1877).

the Articles of Confederation or the Constitution can be regarded as demanding enforcement of the judgment.⁷⁷ That proceedings of the kind in question are not only unfair but also against the Law of Nations is expressly stated in several decisions, of which *Piquet v. Swan*⁷⁸ is remarkable because it was rendered by Mr. Justice Story, sitting as circuit judge. The same argument was then used by the Supreme Court of the United States in those two decisions in which it authoritatively settled the problem.

In 1848, the Supreme Court of Georgia held that an action in personam against a resident of South Carolina could not be brought in Georgia, expressing itself as follows:

You cannot bring a foreigner into the courts of Georgia, to answer to a proceeding against him personally, without his consent. Against it lies an absolute prohibition, found in the rights of sovereignty, and sanctioned by the usage of the civilized States of the world.⁷⁹

In *D'Arcy v. Ketchum*, it was held by the United States Supreme Court that full faith and credit was not due to a New York judgment

⁷⁷ *Kibbe v. Kibbe*, Kirby's Rep. (Conn.) 119 (1786); *Phelps v. Holker*, 1 Dall. (Pa.) 261, 264 (1788) (McKean C. J.: "The Articles of Confederation must not be construed to work such evident mischief and injustice, as are contained in the doctrine urged for the plaintiff."); *Rogers v. Coleman*, 3 Ky. (Hard.) 413, 415 (1808); *Kilburn v. Woodworth*, 5 Johns. (N.Y.) 37, 41 (1809); *Green v. Sarmiento*, 1 Peters C.C.R. 74, 3 W.C.C.R. 17 (1810) (dictum by Bushrod Washington, J.: To render a judgment against a person who has not been given a fair chance to be heard, would be "an outrage upon the immutable dictates of justice."); *Aldrich v. Kinney*, 4 Conn. 380, 383 (1822) ("A more preposterous proposition cannot be advanced, one more contrary to reason and justice; more injurious to the absolute rights of man, or to fundamental principle; than that a person shall be invincibly bound, by a judgment, obtained against him without notice. Audi alteram partem."); *Dennison v. Hyde*, 6 Conn. 508 (1827); *Hall v. Williams*, 6 Pick. (Mass.) 232 (1828) (Parker, C. J.: "[I]t is manifestly against first principles, that a man should be condemned, either criminally or civilly, without an opportunity to be heard in his defence."); *Starbuck v. Murray*, 5 Wend. (N.Y.) 148, 156 (1830) ("against natural justice").

Of interest also is the dissenting opinion delivered by Judge Livingston in *Hitchcock v. Aicken*, 1 Caines (N.Y.) 460, 472 (1803). Against the opinion of the Court that in spite of the full faith and credit clause, the judgment of a sister state constituted no more than a rebuttable presumption of its correctness, Livingston, J., argued that a sister state judgment was not open to inquiry as to correctness. As against the Court's argument that the possibility of a new inquiry had to be left open in order to prevent the enforcement of a sister state judgment rendered without jurisdiction, Livingston, J., has this to say: "Let a law be ever so plain, cases must and will happen which were not foreseen, or would have been provided for; the courts must then determine, according to the reason and spirit of the provisions, whether they include the particular subject before them. These are the cases, which *lex non exacte definit, sed arbitrio boni viri permittit*." The problem was settled in Judge Livingston's sense in *Mills v. Duryee*, 7 Cranch (U.S.) 481 (1813).

⁷⁸ 5 Mason 35 (1828). Admission in Massachusetts of an action in personam against a resident of France would imply "a usurpation of foreign sovereignty, not justified or acknowledged by the law of nations."

⁷⁹ *Dearing v. The Bank of Charleston*, 5 Ga. 497 (1848).

rendered against a resident of Louisiana who had neither been personally served with process in New York nor entered an appearance or otherwise consented to the proceedings. Referring to the state court decisions which had denied faith and credit to sister state judgments rendered under similar circumstances, Mr. Justice Catron said:

[I]n so holding they have altogether disregarded, as inapplicable, the Constitution and laws of the United States regarding full faith and credit. We deem it to be free from controversy that these state adjudications are in conformity to the well-established rules of international law regulating governments foreign to each other; and this raises the question, whether [the full faith and credit clause of] our federal Constitution and the act of Congress founded on it have altered the rule.⁸⁰

This question is then answered with a clear "no."

In *Hall v. Lanning*,⁸¹ *D'Arcy v. Ketchum* was expressly referred to as holding that the scope of the full faith and credit clause is limited "by a rule of international law."

Finally, in *Pennoyer v. Neff*,⁸² the Court stated that an Oregon statute, applied as authorizing an in personam action against a resident of California, constituted an illegal invasion of the sovereignty of California "in view of those rules of international law respecting the jurisdiction of an independent state over persons and property." Analogous lines of argumentation are encountered in those discussions in which a state's jurisdiction, through its legislature or its courts, to grant divorces is held to be limited to persons residing within it. The proposition is either stated apodictically⁸³ or derived from the law or

⁸⁰ 11 How. (U.S.) 165, 174 (1850).

⁸¹ 91 U.S. 160, 168 (1875).

⁸² 95 U.S. 714 (1877).

⁸³ Jurisdiction to grant divorces apodictically stated to be limited to residents: *Bradshaw v. Heath*, 13 Wend. (N.Y.) 407 (1835); *Ditson v. Ditson*, 4 R. I. 87, 101 (1856) (Ames, C. J.: "*It is obvious* that marriage, as a domestic relation, . . . gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized State, and certainly every State of this Union, is the sole judge so far as its own citizens or subjects are concerned . . .; that a State cannot be deprived . . . of its *sovereign power* to regulate the status of its own domiciled subjects and citizens . . . *by virtue of its inherent power* of its own citizens and subjects.") (italics supplied); *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877) (dictum by Field, J.: "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The *jurisdiction which every State possesses* to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved . . . 2 Bish. Marr. & Div. §156.") ; *Cheely v. Clayton*, 110 U.S. 701, 705 (1884) ("The courts of the State of the domicile of the parties *doubtless* has jurisdiction to decree a divorce in accordance with its laws.") (italics supplied); *Maynard v. Hill*, 125

the comity of nations.⁸⁴ The notion of due process of law is not applied except to justify the alleged injustice of recognizing the power of the state of residence of one party to grant an ex parte divorce against a non-resident defendant.⁸⁵ The idea that the due process clause of the 14th Amendment could stand in the way of a consent divorce appears for the first time in *Alton v. Alton*,⁸⁶ the case which constitutes the starting point of this article.

In these as in the other situations just presented the two lines of argumentation do not stand in any way in contrast to each other. As a matter of fact, in both lines of argument the limitation of a state's jurisdiction to property and persons within it is derived from the concept of sovereignty.⁸⁷ If one state oversteps the limits of its sovereignty,

U.S. 190 (1888) ("the recognized power of a government to deal with its own citizens"); *Atherton v. Atherton*, 181 U.S. 155, 163 (1901) (reference to the statement made by Field, J. in *Pennoyer v. Neff*, and quoted above); *Bell v. Bell*, 181 U.S. 175, 177 (1901) ("No valid divorce . . . can be decreed on constructive service by the courts of a state in which neither party is domiciled"); *Streitwolf v. Streitwolf*, 181 U.S. 179 (1901); *Andrews v. Andrews*, 188 U.S. 14 (1903). (In holding constitutional the Massachusetts statute by which out-of-state divorces of residents of Massachusetts are declared invalid, White, C. J., expressed himself as follows: "The Statute in question was but the exercise of an essential attribute of government, to dispute the possession of which would be to deny the authority of the State of Massachusetts to legislate over a subject inherently domestic in its nature." On the general problem of the full faith and credit clause, White said, at p. 34: "Although a particular provision of the Constitution may seemingly be applicable, its controlling effect is limited by the essential nature of the powers of government reserved to the States when the Constitution was adopted.") (italics supplied); *Haddock v. Haddock*, 201 U.S. 562 (1906) (White, C. J., again spoke, on p. 569, of the "inherent power which all governments must possess over the marriage relation . . . as regards their own citizens.") (italics supplied); *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (Douglas, J.: "Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.") (italics supplied).

⁸⁴ Limitation of divorce jurisdiction to residents expressly deprived from comity or Law of Nations: *Borden v. Fitch*, 15 Johns. (N.Y.) 121, 143, 144 (1818) (The alleged jurisdiction of Vermont cannot be justified "by any principles of comity which have been known to prevail in the intercourse of civilized states."); Report of Commissioners on Massachusetts statute of 1835, Pt. II, p. 123, cited by White, C. J., in *Haddock v. Haddock*, 201 U.S. 562, 588 (1906): "This is founded on the rule established by the comity of all civilized nations, and is proposed merely that no doubt should arise on a question so interesting and important as this sometimes may be." Jurisdictional limitations upon a state's power to grant divorces are elaborately and explicitly based upon the Law of Nations by Joel Bishop in his *Treatise on Marriage and Divorce* Book IX (1st ed., 1864), the 7th chapter of which is entitled "The distinction between the jurisdiction by statutory command and under international rule."

⁸⁵ *Haddock v. Haddock*, 201 U.S. 562 (1906); dissenting opinion of Jackson, J., in *Williams v. North Carolina*, 317 U.S. 287, 316 (1942).

⁸⁶ 121 F. Supp. 878 (D. V.I., 1953); 207 F. 2d 667 (C.A. 3d, 1953).

⁸⁷ Consult especially *Adams Express Co. v. Ohio*, 165 U.S. 194 (1897); *Ditson v. Ditson*, 4 R. I. 87 (1856); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Maynard v. Hill*, 125 U.S. 190 (1888); *Haddock v. Haddock*, 201 U.S. 562 (1906).

it necessarily infringes upon that of another, and thus violates the Law of Nations by which respect is demanded of each state for the sovereignty of every other. We thus reach the conclusion that, insofar as jurisdictional limitations are not based upon notions of fairness and due process, they are founded upon certain principles of the Law of Nations. By virtue of the Law of Nations, the territorial jurisdiction of each state is limited and these limitations of the Law of Nations must be regarded as being implied in the full faith and credit clause of the Constitution of the United States. It must thus be read as requiring that:

Full faith and credit shall be given in each State to the public acts of such other State as under the Law of Nations has jurisdiction to legislate on the matter in question.

Full faith and credit shall also be given in each State to the judicial proceedings of such other State as under the Law of Nations has had jurisdiction to proceed judicially.⁸⁸

III

The view just presented, i.e., the view that territorial jurisdiction of the states of the Union is determined by rules of the Law of Nations, and that the constitutional requirement of full faith and credit is limited by these jurisdictional rules of the Law of Nations, is likely to encounter two objections. It may be asked, first, what the Law of Nations has to do with the relations between the states of a federal union, which, by virtue of their membership in the Union, are not sovereign nations; and it may be asked, second, whether the Law of Nations contains within its body any rules at all by which limits may be set to the jurisdiction of the several members of the community of nations. It will be advisable to begin with the second of these two objections; as we proceed to discuss it, we shall, as it will turn out, also find the answer to the first.

1. The Law of Nations or, as we now mostly say, International Law, is based upon the principle of sovereignty, and it is the very nature of sovereignty that a nation's freedom of action is not limited except by some rule of the Law of Nations. Where no such rule exists, a nation may by its own law limit its, or more correctly, its officers', freedom of action, but such self-limitation can at any time be shaken off

⁸⁸ This formulation is, in substance, the same as that of Professor Crosskey, who circumscribes the meaning of the first sentence of the full faith and credit clause as follows: "Full effect shall be given, in each state, to the legislation, judicial precedents, and decrees, of every other state, as will answer, in every respect, to what is required by the rules and principles of the conflict of laws." *Op. cit. supra* note 40, at 550.

by the nation itself. Does International Law then contain rules by which the several nations' legislative, judicial and administrative jurisdictions are limited against each other? At present it seems that no limitations are generally recognized beyond one which is contained in the principle that no nation's officer is allowed to engage in the exercise of state power within the territory of another.⁸⁹ The United States would violate International Law if the sheriff of a state would try to make an arrest upon Canadian soil, or if an American consul in Switzerland would conduct upon Swiss soil a hearing to examine a witness for purposes of a law suit pending before an American court.⁹⁰ But International Law is in no way violated when a court of the United States tries on American soil a citizen of the United States who, while abroad, has refused to come home to testify⁹¹ or to pay taxes, or who has committed an act of treason against the United States.⁹² Turkey has been held by the Permanent Court of International Justice not to have violated International Law when, in Turkey, Turkish officials arrested, tried and imprisoned a French citizen who had caused the death of several citizens of Turkey by acts of negligence committed upon the high seas.⁹³ An American occupation court exercising German state power has tried and sent to prison a citizen of Czechoslovakia who had mistreated citizens of Germany, Czechoslovakia, and other nations, and thus brought himself under a German law which threatens with punishment anyone committing such acts both inside and outside of Germany.⁹⁴ None of these "extraterritorial" exercises of state power

⁸⁹ For a survey of the literature, see Harvard Research in International Law, Jurisdiction over Crime, 29 Am. J. Int. L., Supp. 439 (1935); Moore's Digest of International Law §§ 175, 537 (1906); Hyde, International Law §§ 220, 244 (2d rev. ed., 1945); Schooner Exchange v. McFaddon, 7 Cranch (U.S.) 116 (1812).

⁹⁰ Cf. Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515 (1953).

⁹¹ Blackmer v. United States, 284 U.S. 421 (1932).

⁹² 18 U.S. Code § 1 provides that "whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." This statute was applied to acts committed abroad in U.S. v. Chandler, 72 F. Supp. 230 (D. Mass., 1947), 171 F. 2d 921 (C.A. 1st, 1948); U.S. v. Best, 76 F. Supp. 138 (D. Mass., 1948), 184 F. 2d 131 (C.A. 1st, 1950); and Gillars v. U.S., 182 F. 2d 962 (C.A. D.C., 1950).

⁹³ Case of the S. S. Lotus, Publications of the Permanent Court of International Justice Series A, No. 10; 2 Hudson, World Court Reports 18 (1927).

⁹⁴ Office of the U.S. High Commissioner for Germany v. Hrencecek, U.S. Court of the Allied High Commission for Germany, Crim. 52-A5-486, Leo M. Goodman, Presiding U.S. Judge, Area 5 (26 May 1954). In the course of the expulsion of the two-and-one-half million Sudeten Germans from Czechoslovakia, in the spring of 1945, several hundred thousand persons were arrested and interned in Czechoslovakian concentration camps. Of

constitutes a violation of International Law. No country has ever protested against the practice of Italy, Germany and other nations of proceeding against a foreign resident in exactly that way which was declared to be inadmissible by the Supreme Court of the United States

the persons subjected to these measures some were nationals of Germany and others of the Czechoslovak Republic. In several of the camps inmates were brutally beaten, tortured, or killed. Between May 1945 and November 1946, Vaclav Hreneck, a Czechoslovak police officer, was Deputy Commander of the Internment Center at Budweis, Czechoslovakia, where, during his term of office, numerous inmates were cruelly abused, in some cases with death resulting. In the proceedings subsequently prosecuted against him, Hreneck was found not only not to have prevented such maltreatment of prisoners, but in several cases to have ordered, and also to have actively participated in, it. In the spring of 1949, Hreneck, in order to escape prosecution by the Communist government of Czechoslovakia, fled to Germany. He was recognized by former inmates of the Budweis concentration camp, arrested by the German police, and charged before the District Court No. I in Munich, a regular court of the Federal Republic of Germany, with having committed numerous acts of criminal assault as defined in § 223 of the German Criminal Code. The prosecution was based upon this Section of the German Criminal Code in conjunction with § 4 of the German Criminal Code, and § 1 of Law No. 108, dated 28 June 1933, of the Czechoslovak Republic.

Section 4 of the German Criminal Code reads as follows: "The German Criminal Law shall apply to an alien for an offense committed abroad, if the act also is a punishable offense under the law of the place where it was committed, . . . provided the offense was directed against a German national."

Since the accused at the time of his arrest had been in the employ of the U.S. Armed Forces in Germany, and thus was to be regarded as a member of the Allied Forces within the meaning of High Commission Law No. 2, the U.S. High Commissioner, upon the basis of Article 1 (a) of Allied High Commission Law No. 13, and Art. 1 of U.S. High Commissioner Law No. 6, ordered that the case be transferred from the German Court in Munich to the U.S. Court of the Allied High Commission for Germany, Area 5 (Munich). While applying its own procedural law, this Court applied the same substantive law that would have been applied by a German court. Having found Hreneck guilty of the offenses charged, the Court sentenced him to eight years imprisonment in a German penitentiary. Judge Goodman's elaborate opinion contains a remarkable discussion of the problem of whether or not the provision of § 4 of the German Criminal Code is compatible with International Law. He convincingly demonstrates that International Law does not forbid a country to punish an alien for a crime which he has committed abroad against a national, or against the national interest, of that country, if it succeeds in arresting him within its own territory.

The extent of jurisdiction to punish for crime has been widely discussed, especially in connection with the *Lotus* case (note 93 *supra*). The literature is collected and discussed in *Harvard Research in International Law, Jurisdiction over Crime*, 29 *Am. J. Int. L. Supp.* 439 (1935). Of special interest is the Report on Extraterritorial Crime and the Cutting Case, U.S. Foreign Relations, 1887, written by John Bassett Moore in his capacity as a State Department officer. In the Cutting case the United States protested against the act of the Mexican government which had prosecuted and convicted of criminal libel an American citizen, Cutting, whose allegedly criminal activities had been carried on within the territory of the United States. The American protest was rejected by the Mexican government, which maintained in its reply that every nation has the right to hold foreigners "responsible for acts they may commit abroad against that nation, or against any of its citizens or subjects." (See 2 U.S. For. Rel.: 1888, at p. 1114; 2 Moore, *International Law* 240.) Sitting as a judge of the Permanent Court of International Justice in the *Lotus* case, Mr. Moore objected to the claim of Turkish jurisdiction insofar as it was to be based exclusively upon the Turkish nationality of the victim.

when it had been applied by Oregon against a resident of California.⁹⁵ No protest has been lodged either, against the English and American claims of jurisdiction over a mere transient on whom the sheriff succeeds in serving a summons while he happens to change ships or planes in an American port.⁹⁶ No rule of International Law prevents the Mexican state of Chihuahua from granting mail order divorces to people who have never come near Chihuahuan soil, nor would any rule, it seems, stand in the way of some other enterprising country rendering its courts available for the issuance of default money judgments against anyone in the whole world.⁹⁷ Of course, no other country would enforce such a judgment, least of all the country of the defendant's residence. But if in some way the defendant should happen to acquire property in the country by whose court the judgment was rendered, International Law could hardly be said to be violated when such property is attached in execution of the judgment. No country has so far embarked on such a course nor is any country likely to do so. All countries have, indeed, adopted rules by which they have established some territorial limits to the exercise of their governmental powers by their courts and other officers and agencies. In the United States we do not generally prosecute acts committed by foreigners abroad and our courts do not render default judgments in personam against non-residents, nor do we undertake to levy upon a resident a tax measured by the value of a piece of land situated abroad. In similar, although not necessarily identical, ways, foreign countries have limited the territorial scope of the exercise of their governmental powers. But these limitations are established not by International Law but by every country's own internal law, by which they can be expanded or restrained in any way that may be deemed fit by the law-making agencies

⁹⁵ *Pennoyer v. Neff*, 95 U.S. 714 (1877). Section 23 of the German Code of Civil Procedure provides as follows: "An action for the payment of money or any other claim of money's worth against a person who has no residence in Germany, may be brought in the court of any district within which such person owns any property."

⁹⁶ See *Peabody v. Hamilton*, 106 Mass. 217 (1870): The defendant was a non-resident en route from Nova Scotia to New York. Service was made on him while he was on board a British mail steamer in Boston Harbor. The jurisdiction of Massachusetts was upheld by the Supreme Court of the Commonwealth.

Fisher v. Fielding, 67 Conn. 91, 34 Atl. 714 (1895): Suit in Connecticut to enforce an English judgment. The jurisdiction of the English courts was based upon service on an alien transiently stopping in an English hotel. The English jurisdiction was upheld.

See also *Bowman v. Flint*, 37 Tex. Civ. App. 28, 82 S.W. 1049 (1904), and *Harris v. Balk*, 198 U.S. 215 (1904).

⁹⁷ Cf. *Rheinstein*, *Die inländische Bedeutung einer ausländischen Zwangsvollstreckung in Geldforderungen*, 8 *Zeitschrift für ausländisches und internationales Privatrecht* 277 (1934).

of the country in question.

Whenever the court or administrative agency of a country pronounces a decree or other act which purports to bring about legal effects in another country, the act remains an empty gesture insofar as it is not "recognized" by the other country. If a Canadian court renders a money judgment against a defendant who has the bulk of his property in the United States, the judgment is of little value to the victorious party unless execution upon it can be had in the United States. A Mexican mail order divorce is of doubtful value to American parties if, on remarriage, they are jailed for bigamy by their American state of residence. The United States Code of Internal Revenue which imposes an income tax on all income earned abroad by a citizen of the United States⁹⁸ remains a dead letter against a citizen who has no property within the United States and lives in a country which will not help the United States enforce its tax claim. The provision of the Italian Criminal Code which threatens with punishment the foreigner who anywhere in the world cheats, steals from, or bodily injures, an Italian citizen,⁹⁹ is ineffective against one who neither comes into Italy nor owns any property there.

If an Italian court has to determine the intrinsic validity of a marriage entered into by a national of Italy, it is by its Code ordered to apply Italian law even though the marriage was celebrated in the United States by an Italian residing there.¹⁰⁰ An American court, on the other hand, will apply American law to the marriage of residents of the United States celebrated in the United States even though the parties were citizens of Italy.¹⁰¹ If an Italian national declared by Italian law to be incapable of concluding a contract makes a contract in a state of the United States where a person of his qualifications has full contractual capacity, an Italian court will apply Italian law and declare the contract invalid,¹⁰² while an American court will apply American law and declare the contract valid.¹⁰³

It is apparent from these illustrations that countries frequently claim for themselves a scope of jurisdiction which is broader than that which other countries are willing to concede to them. Frequently a country may even claim for itself a jurisdiction broader than that which it is ready to concede in others. By internal English law, it is declared that

⁹⁸ Consult U.S. Code of Internal Revenue, 26 U.S.C.A. §§ 861 et seq. (1952).

⁹⁹ Italian Penal Code of 1930, Art. 10.

¹⁰¹ Rest. Conflict of Laws § 121 (1934).

¹⁰⁰ Italian Civil Code of 1942, Art. 17.

¹⁰² Italian Civil Code of 1942, Art. 17.

¹⁰³ Rest. Conflict of Laws § 333 (1934); *Milliken v. Pratt*, 125 Mass. 374 (1878).

under certain circumstances an English court may render a default money judgment against a non-resident. But when a French court rendered a default judgment against a non-resident Dane, execution could not be obtained against the defendant's assets in England.¹⁰⁴ Just as it is up to every country to determine the extent to which it wishes to exercise jurisdiction "extraterritorially," so it is left under present day International Law to determine for itself to what extent it will "recognize" the jurisdiction of another country, i.e., the extent to which it will give effect or, what is the same, "faith and credit" to the legislative, judicial or administrative acts of another country's agencies.¹⁰⁵ In other words, conflict of laws is regarded at present as constituting a subject matter of purely national regulation to be established and elaborated by every nation freely for itself.¹⁰⁶ This national character applies to conflicts law in all its branches: determination of the scope of jurisdiction of the country's own courts and administrative agencies; scope of recognition of foreign judgments and other governmental acts; scope of the country's own criminal and tax laws; and also, and quite particularly, scope of application of the country's own, as well as every other country's, laws on problems of private law. Voluntarily, a country may bind itself by treaty to regulate its judicial, legislative, taxing, criminal or administrative jurisdiction in some particular way. Apart from treaty, prevailing present day opinion regards every nation as free to determine its conflicts law in accordance with its own notions of justice, policy, practicability, tradition, or legal technics.¹⁰⁷ The only limit generally recognized is the principle which we have already mentioned by which it is forbidden to the officers of any state to perform an act of state power upon the territory of another.

¹⁰⁴ *Schibsby v. Westenholz*, L.R., 6 Q.B. 155 (1870).

¹⁰⁵ While in the United States as well as in the United Kingdom and in the other Commonwealth countries foreign judgments are readily recognized, provided the country of the forum had jurisdiction according to Anglo-American notions, recognition is withheld as a general rule by France, The Netherlands and numerous other countries. An intermediate position is occupied by such countries as Germany, Italy or Austria, where foreign judgments are recognized under certain conditions, especially that of reciprocity. It has never been claimed that the French position of generally refusing recognition of foreign judgments would violate any command of International Law. On the enforcement of foreign judgments see Lorenzen, *The Enforcement of American Judgments Abroad*, 29 *Yale L. J.* 188 (1919); League of Nations, *Report of a Committee of European Jurists on the Enforcement of Foreign Judgments* (1925), repr. 21 *Ill. L. Rev.* 1, 5 (1926).

¹⁰⁶ Cf. Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 *Col. L. Rev.* 189 (1942).

¹⁰⁷ 1 Rabel, *Conflict of Laws* 9 (1945); Cheatham, *Sources of Rules of Conflict of Laws*, 89 *U. of Pa. L. Rev.* 430 (1941).

2. In the situation just described it would seem to be impossible to maintain the view which we have asserted above, viz., that the rules by which the jurisdiction of the several states of the United States is subjected to spatial limitations are derived from the Law of Nations and that in such sense the Law of Nations has been incorporated in the full faith and credit clause of the Constitution of the United States. The answer lies in the fact that since the making of the Constitution the term Law of Nations has assumed a new meaning and that we must imply into the Constitution not the International Law of the mid-twentieth century, but the Law of Nations as it was understood in the late eighteenth century. In his book, *Politics and the Constitution*, Professor William Crosskey has shown that the difficulties and alleged absurdities of the full faith and credit clause evaporate if we read it in this way.¹⁰⁸ This view of his, which is based upon his extensive investigation of the process by which the Constitution of the United States was made, is confirmed not only by that survey of cases which we have presented above,¹⁰⁹ but also by the general history of the use and meaning of the term "Law of Nations."

The term International Law is of comparatively recent origin. It seems to have been invented by French writers of the early 19th century as a synonym of the older term "Law of Nations," which, in turn, was a translation of the Latin term *ius gentium*.¹¹⁰ This term has had a long history. It was coined by the jurists of ancient Rome, who distinguished between those legal rules and institutions which were peculiar to their own city and citizens, and those which they observed, or believed to observe, as being common to all peoples alike. The former they called *ius civile*, and the latter *ius gentium*.¹¹¹ The distinction was

¹⁰⁸ *Politics and the Constitution* 541 et seq., 563 et seq. (1953).

¹⁰⁹ Authorities discussed p. 793 et seq. *supra*.

¹¹⁰ Cf. Radin, *Ius gentium*, 8 *Enc. Soc. Sci.* 502, and bibliography, at p. 504 (1st ed., 1932).

¹¹¹ Gaius, *Institutes* 1 §1. "Omnes populi, qui legibus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur; nam quod quisque populus ipse sibi ius constituit, id ipsius propria est vocaturque ius civile, quasi proprium civitatis; quod vero naturalis ratio inter homines constituit, id apud omnes populos peraeque custoditur, vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur." (All peoples which are governed by laws and customs, make use partly of their own law and partly of that which is common to all men. That law which each people has constituted for itself is its own proper law and is called "ius civile" as it is proper of that particular political community (civitas). That law, however, which natural reason has established among all men, is observed among all peoples everywhere and is called "ius gentium" because of that law all peoples make use. Hence the Roman people make use partly of their own proper law, and partly of that which is the common law of all men.)

of more than purely theoretical character. The agencies by which legal disputes were decided between citizens in accordance with the *ius civile*, i.e., the city praetor (*praetor urbanus*) and the lay judges appointed by him for each individual case, had no jurisdiction in disputes between peregrines, i.e., citizens of city states or kingdoms other than Rome, or even between a Roman citizen and a peregrine. When Rome, in the period of the late republic, became the center of trade of the Mediterranean world, machinery had to be provided for the decision of such disputes. A special magistrate, the praetor of the peregrines (*praetor peregrinus*), came to be invested with jurisdiction, but in the cases which were brought before him, it was not possible to apply the *ius civile*, which was the special privilege of citizens. There was thus developed a set of laws which was believed to express those rules and institutions which were common to all peoples everywhere. In this way Rome developed a system of uniform law of universal application, the existence of which made it unnecessary to develop any rules of conflict of laws in the sense of rules indicating whether a given case should be decided under the law of one state rather than another. The situation resembled that which existed in the United States in the one-hundred-year period between the Supreme Court's decisions in *Swift v. Tyson*¹¹² and *Erie Railroad v. Tompkins*.¹¹³ Litigation between citizens of a place would be decided under the *ius civile* of that particular place; but "diversity of citizenship cases" would be handled under a law of uniform validity.

In Rome, the distinction between *ius civile* and *ius gentium* lost much of its practical significance when, in the period of the classical jurists, disputes between citizens came to be decided by rules derived from *ius gentium*, and Roman citizenship was extended to practically all the free inhabitants of the Empire.¹¹⁴ However, the distinction between *ius civile* and *ius gentium* continued to be stated in the writings of the jurists and thus came to appear in the Corpus Juris in which these writings were collected.¹¹⁵ When the Corpus Juris had been re-discovered in medieval Italy, the term *ius gentium* came to lend itself as a convenient device for the development of ideas which had become necessary in connection with far-reaching developments on the polit-

¹¹² 16 Pet. (U.S.) 1 (1842).

¹¹³ 304 U.S. 64 (1938).

¹¹⁴ This process is usually regarded as having been made complete by the Constitutio Antoniniana of Emperor Caracalla, issued in 212 A. D.; recent literature on this much discussed enactment is listed by Jörs and Kunkel, *Römisches Privatrecht* 57 (3d ed., 1949).

¹¹⁵ Cf. Ulpianus, D. 1.1.1.1.; Inst. 1, 2, 1-2.

ical scene. In the medieval view national states did not occupy that dominating position which they hold today. Christendom was a hierarchically organized unit under God, whose lieutenants on earth were the Pope and the Emperor. Whether these potentates were of equal rank or whether the Emperor was subordinate to the Pope, constituted one of the fateful controversies of the times. Another controversy related to the relations between the Emperor and the kings of such territories as England, France, Sicily or Castile, who were practically independent of him. As to the law, the Middle Ages were characterized by the immense variety of customs of various localities and personal groups. But when comprehensive juristic theories were developed, the idea took hold that a law common to all Christendom was standing behind all the various local and group customs, a law which could be resorted to in that ever increasing number of cases for which the customs and statutes had no answers, but which also was the law which was concerned with legal relations and transactions transcending the spheres of any single unit of local or group statute or custom. Upon the rediscovery of the law of the Corpus Iuris Civilis a tendency arose to identify the common law of Christendom with the Roman Law, the general authority of which was sought to be based upon the claim of the emperors of the Holy Empire of Germanic Nation to be the direct successors of the Roman caesars. The clash of this theory with the factual independence from the Empire of the local kings and the Italian city states was sought to be bridged by such propositions as that which declared each king, and quite particularly that of France, to be emperor within his kingdom. From the late 13th century on, the impotence of the Empire as such, its transformation into the national state of the Germans, and the establishment of the other kingdoms as independent nations became so obvious, that the claim of general authority of a common law of Christendom as imperial law became untenable. But the idea that such a law existed was far from being extinguished. The source of its authority was now found in its foundation in divine ordination and nature, as well as in the ancient notion of a *ius gentium* as "the law of which all men make use in common." In this *ius gentium* the rules were found for the relations of rulers and nations to each other, including those which would limit their proper spheres of jurisdiction. But there were also found in the *ius gentium* the rules for those activities of men which by their nature transcend the boundaries of a single nation, such as shipping and the activities of the

merchants insofar as they do not pertain to purely local business.

In both respects the Middle Ages have given the opportunity for the development of bodies of rules which were more or less uniform throughout Christendom. When Europe had recovered from the catastrophe of the collapse of the Roman Empire, trade revived among all its parts and assumed considerable proportions. Exchange was lively not only for the products of different parts of Europe but also between Europe and the East. The Crusades were waged not exclusively for religious reasons. Those who were engaged in what we would nowadays call international trade constituted one of those groups of people which settled their controversies in their own courts and in them developed their own sets of customs, which became known as the law merchant and the law of the seas.¹¹⁶ Clearly, the conception as to what these customs provided, varied in many a detail, but yet they were regarded to be the same in all parts of Christendom, to be made use of by all nations alike, and thus to be parts of the *ius gentium*. This *ius gentium* was a felt reality in all Christendom; men acted in accordance with it and writers concerned themselves both with the content of its various parts and its general theory. Toward the very end of its long sway, in the 17th and 18th centuries, the *ius gentium* or, as it was increasingly called in England, the Law of Nations, was brought into a specially close relationship with that Law of Nature in which the scholars of the age of reason and enlightenment sought to find the ground and foundation of all law.

Natural law ideas came to play a decisive role in the development of that branch of the *ius gentium* which had become necessary with the recognition of sovereignty of the several nations, i.e., that branch which concerned itself with the legal rights and duties existing in the relationships of the sovereign nations among themselves. It was this branch to which the term Law of Nations and its later synonym finally came to be limited. Throughout the 18th century and far into the 19th, the term continued, however, to be used with its older, broader meaning. It is also during that period that we find the terms *ius gentium* and Law of Nations applied to that body of legal rules and principles which we now call the "law of conflict of laws" or "private international law." The very existence of the latter term, which is widely used in England,¹¹⁷ and whose counterparts in other languages constitute the prac-

¹¹⁶ Cf. Sanborn, *Law Merchant*, 9 Enc. Soc. Sci. 270, and bibliography at 274 (1932).

¹¹⁷ Cf. the titles of the following treatises: Westlake (and Bentwich), *Treatise on Private International Law* (7th ed., 1917); Foote (and Bellott), *Private International Law* (5th

tically exclusive name of the field in other countries,¹¹⁸ indicates that it was once regarded as a part of International Law.¹¹⁹

That the law of conflict of laws belongs to the *ius gentium* was expressly stated by that writer through whose work conflicts law became introduced into England.¹²⁰ In the first paragraph of the chapter entitled "On the conflict between the different laws in different realms" Huber states:

It often happens that a transaction which is contracted in one place, is to have effect in places of another realm, or that it will have to be adjudicated elsewhere. It is known, however, that the laws and statutes of the several peoples differ in many respects. Once the provinces of the Roman empire were torn asunder, the Christian world is divided in almost innumerable peoples, which are neither subject to one another nor united in a common order or rule. In Roman law no rules existed, of course, on this matter because the empire of the Roman people extended over all parts of the world and was governed by a uniform law. No conflicts between different laws could thus arise. It nevertheless seems that the basic rules by which the decision of such matters must be determined must be derived from the Roman law. However, *the question belongs to the ius gentium rather than the ius civile*, because what different people must observe between each other, obviously belongs to the field of *ius gentium*.

ed., 1925); Cheshire, *Private International Law* (4th ed., 1952); Phillimore, *Commentaries upon International Law*, vol. 4, *Private International Law* (1889); Wolff, *Private International Law* (2d ed., 1952); Schmitthoff, *Textbook of the English Conflict of Laws (Private International Law)* (1945); Nelson, *Selected Cases on Private International Law* (1889); Morris, *Selected Cases of Private International Law* (1940).

¹¹⁸ Cf. 1 Rabel, *Conflict of Laws* 11 (1945).

¹¹⁹ This aspect is well illustrated by the existence of learned treatises which are generally devoted to International Law and which are divided into two parts respectively dealing with Public International Law and Private International Law; see, for instance, Phillimore, *Commentaries upon International Law* (London, 1889); Diena, *Principi di diritto internazionale* (2d ed., 1917); Fedozzi e Romano, *Trattato di diritto internazionale* (1933).

Both branches of International Law are also treated in the *Journal de droit international* [Clunet] (1874 et seq); *Revue de droit international* [Darras] (1905 et seq); *Rivista di diritto internazionale* (1906 et seq); *Zeitschrift für internationales Recht* (1891-1937); *British Year Book of International Law* (1920 et seq); *International Law and Comparative Quarterly* [1947] (1952 et seq); *Schweizerisches Jahrbuch für internationales Recht* (1944 et seq); *Recueil des cours de l'Académie de droit international* (1923 et seq); *Annuaire de l'Institut de droit international* (1875 et seq); *Nordisk Tidsskrift for international Ret* (1930 et seq); *Nederlandsche Tijdschrift voor Internationaal Recht* (1953 et seq).

¹²⁰ Uricus Huberus, *De conflictu legum diversarum in diversis imperiis* (Of the Conflict of Diverse Laws of Diverse Governments), constituting section 4 of title 3, part 2, book 1 of Huber's *Praelectionum iuris civilis tomi tres*. The book was first published in 1707. The text follows the edition by Jodocus Plat, Louvain 1766. The full Latin text with English translation has been published by E. Lorenzen in 13 Ill. L. Rev. 375, 401 (1919), repr. *Selected Articles on the Conflict of Laws* 162 (1947). The Latin text can also be found in Guthrie's edition of Savigny's *Conflict of Laws* (2d ed., Edinburgh, 1880, p. 508).

The immense influence which Huber's work has had on conflicts law in England and the United States is well known.¹²¹ It may be directly due to Huber's influence or, more probably, to the general climate of the times, that English judges and writers also came to speak of conflict of laws problems as belonging to the field of *ius gentium*.¹²² In 1748, Lord Hardwicke declared a French decree establishing the validity of a marriage to be conclusive "from the law of nations in such cases."¹²³ In 1752, Sir Edward Simpson pronounced in the Consistory Court of London that by the *ius gentium* the validity of an alleged marriage is to be determined by the law of the place where the ceremony took place, and that a judgment of nullity rendered by a court of that country must, also under the *ius gentium*, be given effect in England.¹²⁴ In 1760, Lord Mansfield declared that "the general

¹²¹ On Huber's influence on the Anglo-American law of conflict of laws, see Lorenzen, Huber's *De conflictu legum*, 13 Ill. L. Rev. 375 (1919), repr. Sel. Articles on the Conflict of Laws 136 (1947). It should be noted that as early as 1678 Lord Nottingham declared that "It is against the law of nations not to give credit [note this phrase!] to the judgments and sentences of foreign countries." *Cottington's Case*, cited in 2 Swan. 326, 36 E.R. 640.

In 1607 it was said that "It is by the law of nations that the justice of one nation will be an aid to the justice of another nation, and the one execute a judgment of the other." *Wier's Case*, 1 Rolle Abr. 530.

¹²² A number of these cases have been surveyed by W. C. Cowles, *Judicial Review in Conflict of Laws*, 21 *Nordisk Tidskrift for International Ret* 51 (1951).

¹²³ *Roach v. Jurvan*, 1 Ves. Sr. 157, 159, 27 E.R. 954 (1748). The references to this case and to the cases cited in notes 121-4 were found in Professor Alexander N. Sack's authoritative article on "Conflicts of Laws in the History of the English Law," 3 *New York University, School of Law, Law: A Century of Progress* 342, 441, 449 (1937).

The full text of the passage cited is as follows: The marriage in question is "valid from being established by the sentence of a court in France having jurisdiction, and it is true that, if so, it is conclusive whether in a foreign court or not, from the law of nations in such cases, otherwise, the rights of mankind would be very precarious and uncertain."

¹²⁴ *Scrimshire v. Scrimshire*, 2 Hag. Cons. 395, 417, 161 E.R. 782, 791 (1752). The opinion contains the following passages, which all throw a significant light upon the jurisprudential attitudes of the time: "All nations allow marriage contracts; they are '*iuris gentium*'" (at 417). "As it is of consequence to the subjects of both countries, and to all nations, that there should be one rule of determining in all nations on contracts of this kind, it is to be presumed that all nations do consent to determine on these contracts, by the laws of the country, where they are made. . . . In matters that belong to the *ius gentium*, our Courts always regard the sentences of a proper Court" (at 419). "In commercial affairs under the law merchant, which is the law of nations, there are instances where sentences for or against contracts abroad have been given, and received here on trials, as evidence, and have had their weight. And this has been allowed on a principle of the law of nations, which all countries by consent agree to, for the sake of carrying on commerce which concerns the public in general. There are instances of the same kind in the Court of Admiralty; the sentences of all Courts of Admiralty are taken notice of by one another; they are obligatory by the law of nations. . . . And as all countries are equally interested to have matrimonial questions determined by the laws of the country where they are had, and the mischief would be infinite to the subjects of all nations if it was not so; I am of

rule, established *ex comitate et iure gentium*, is that the place where a contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract.¹²⁵ In 1769, Blackstone wrote in the fourth volume of the Commentaries that "in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England."¹²⁶ In America we find reference made to the Law of Nations as the source of a state's obligation to pay regard to a foreign law in a case which was before the Common Pleas, Philadelphia County in 1786.¹²⁷ In 1783, a judgment was entered against Allen in Pennsylvania. Later during the same year he was discharged from "all his debts" under the insolvency law of New Jersey. He thereupon moved in the Pennsylvania court that its judgment be set aside. In support of the motion his attorneys, Bradford and Lewis, referred to the Law of Nations as requiring that the New Jersey discharge be recognized in Pennsylvania. According to Dallas' report "they observed that by the *Law of Nations*, every transaction, not yet completed, which has a view to its completion in a foreign country, must be determined according to the municipal law of that country." In support of this statement reference is made to those pages of Blackstone's and Burrow's Reports on which *Robinson v. Bland*¹²⁸ is reported, and which must thus have been known to the two Philadelphia lawyers.

Except the last, all these passages cited were published at dates preceding the date of both the Articles of Confederation and the Constitutional Convention. They should suffice to indicate that among men learned in the law of England it was a widely held opinion that it was for the Law of Nations to determine to what extent foreign laws should be applied, under what circumstances attention should be paid to

opinion that this is the *ius gentium* of which this and all courts take notice" (at 421). "The law of the country, where the contract is made, seems to me, according to the law of nations, to be the only rule of determining in these cases" (at 422).

¹²⁵ *Robinson v. Bland*, 1 W. Bl. 234, 256, 258, 96 Eng. Rep. 129, 141 (1760). The sentence quoted in the text does not appear in the report of the case stated in 2 Burr. 1077, 97 Eng. Rep. 717. According to the report in 1 W. Bl. 234, 237, Blackstone, appearing for the defendant, argued that: "From mutual commerce and intercourse, which will quickly follow, arises the necessity not only of a law of nations to regulate that commerce and intercourse, but also of communicating in some degree with the law of other countries, in respect to the contracts of individuals."

¹²⁶ 4 Commentaries 68; in the passage which is cited in 2 Crosskey, *Politics and the Constitution* 1260, Blackstone goes on to say that he is not to pursue the topic in the given context.

¹²⁷ *James v. Allen*, 1 Dallas 188 (Pa. C.P., 1786), cited by Crosskey, *op. cit. supra* n. 108 at 549, 1337.

¹²⁸ 1 Blackstone's Reports 234 (2d ed., 1828); 2 Burrow's Reports 1077 (5th ed., 1812).

foreign judgments, and what effect should be ascribed to them. It is thus no wonder that after the adoption of the Constitution of the United States we find it stated that under the full faith and credit clause the duty of a state to give effect to the judgment of a sister state is no greater than it had been before the Constitution under the Law of Nations.¹²⁹ It is interesting in that respect that in the Pennsylvania case just cited as well as in a case decided two years later¹³⁰ the scope of the duty to honor the foreign discharge of an insolvent debtor under the full faith and credit clause of the Articles of Confederation was uncontrovertedly alleged to be coextensive with that existing under "the general principle of the law of nations."

To the effect that jurisdiction is determined by the Law of Nations, no less an authority than Chief Justice Marshall also expressed himself when he said, in *Rose v. Himely*:¹³¹

Of its own jurisdiction, so far as it depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentence may be within the dominion of the prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon the principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all.¹³²

The doctrines of jurisdiction are a part of the Law of Nations in the comprehensive sense in which this term was once understood, and in this sense they have become a part of our constitutional law. In this sense, they have been understood by the early judges as well as by the writers.

In his *Commentaries on the Conflict of Laws*,¹³³ Judge Story wrote on the full faith and credit clause:

The constitution did not mean to confer any new power upon the states; but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territories.¹³⁴

¹²⁹ Cf. *Bissell v. Briggs*, 9 Mass. 462, 467 (1813), per Parsons, C. J.: "Neither our own statute, nor the federal constitution, nor the act of congress had any intention of enlarging, restraining, or in any manner operating upon the jurisdiction of the legislatures, or of the courts of any one of the United States. The jurisdiction remains as it was before."

¹³⁰ *Miller v. Hall*, 1 Dallas 248 (Supr. Ct. of Pa., 1788).

¹³¹ 4 Cranch (U.S.) 241, 276-7 (1808).

¹³² In connection with the second sentence of the passage quoted, what has been said before should make it clear that the passage is not limited to judgments rendered by the courts of foreign nations.

¹³³ 1st ed., 1834.

¹³⁴ At 509, n. 2, Story refers to his "Comment on the Constit. ch. 29, § 1297 to 1307 (1833), and cases there cited;—*Hall v. Williams*, 6 Pick. R. 237; *Bissell v. Briggs*, 9 Mass. 462; *Shumway v. Stillman*, 6 Wend. R. 447; *Evans v. Tarleton*, 9 Sergt. and R. 260;

In Story's thought, the states' "acknowledged jurisdiction over persons and things within their territories" is derived from those "General Maxims of International Jurisprudence" which are presented in Chapter II of the book, and "without the express or tacit admission of which," he asserts that "it will be found impossible to arrive at any principles to govern the conduct of nations, or to regulate the due administration of justice."¹³⁵

That both jurisdictional limitations and the law of conflict of laws are derived from the Law of Nations is also stated in Judge Cooley's *Constitutional Limitations*.¹³⁶ In the order of ideas of Story, he asserts that "the legislative authority of every state must spend its force within the territorial limits of the State. The legislature of one State cannot make laws by which people outside the State must govern their actions, except as they may have occasion to resort to the remedies which the State provides, or to deal with property situated within the State. . . . Upon the principles of *comity*, however, *which is a part of the law of nations*, recognized as such by every civilized people, *effect is given in one state or country* to the laws of another in a great variety of ways."¹³⁷

The same kind of thought is found in as late a work as *The Constitution of the United States*¹³⁸ by W. W. Willoughby, who has this to say in the chapter entitled "Interstate relations; full faith and credit":

Except as otherwise specifically provided by the Federal Constitution, the States of the American Union, when acting within the spheres of government reserved to them, stand toward one another as independent and wholly separated States. The laws of each State have no force, and its officials have no public authority, outside of the State's territorial boundaries. As to all these matters, their relations *inter se* are governed by the general principles of Private International Law or, as otherwise termed, the Conflict of Laws. It may also be said that the territorial character of the quasi-sovereignty of the States are determined by the accepted principles of general public or international law. Thus, as will presently be pointed out, a State of the Union is without the jurisdiction; not because of Federal

Benton v. Burgot, 10 Sergt. and R. 240; Hancock v. Barrett, 1 Hall Sup. Ct. R. 155; S. C. 2 Hall Sup. Ct. R. 302; Wilson v. Niles, 2 Hall Sup. Ct. R. 358; Hoxie v. Wright, 2 Vermont R. 263; Bellows v. Ingraham, 2 Vermont R. 573; Aldrich v. Kinney, 4 Connect. R. 380."

¹³⁵ *Ibid.*, at 19.

¹³⁶ 1st ed., 1868.

¹³⁷ Cooley, *Constitutional Limitations* 248 et seq. (8th ed., 1927) (italics added). Note that Judge Cooley does not distinguish between interstate and international problems.

¹³⁸ Willoughby, *The Constitution of the United States* (1929).

constitutional limitations, but by reason of a limitation of its territorial sovereignty, as fixed by general Anglo-American jurisprudential principles, to enforce the penal acts of a sovereignty other than its own, to enter personal judgments against persons who have not been personally served within the State, or to determine titles to lands outside the State, or to grant a divorce to non-domiciled petitioners.¹³⁹

The transition, not to a new line of thought, but rather to a different terminology, is expressed in the following passage from the *Treatise of the Law of Conflict of Laws* by Beale, in whose order of ideas the concept of jurisdiction played a dominant role. On its bases, he had this to say:

274. Jurisdiction, as the word is here used, is the power of a state to create rights such as can be recognized by other states as valid; it is a *common conception of all nations*, but the rules for determining it are to some extent different in states governed by the civil law than in those governed by the common law.

275. Jurisdiction, then, is fixed by the common law, but the principles so established, unlike other principles of the common law, are incapable of change by statute. They can be changed only by the slow process of change of legal thought which alone can alter the general system of the common law, or by the concurrent act of the states concerned.¹⁴⁰

Outside of its historical context, this brief statement may not appear to be very helpful. But if we view it in connection with the long historical development, we can take it as an expression of the same thought which underlies all these statements of judges and writers in which the Law of Nations, in the sense of *ius gentium*, is applied to the problem of limiting from each other the proper spheres of governmental activity of the states of the American Union. The problem is that of finding the right way in which these states can harmoniously coexist within that Union so that each can pursue and fulfill its aims and purposes without hampering the corresponding aims and purposes of every other. This thought has been aptly expressed by Mr. Justice Frankfurter, when he said, in *Williams v. North Carolina*:

Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. *Bell v. Bell*, 181 U.S. 175; *Andrews v. Andrews*, 188 U.S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance.

To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable. But to endow each State with controlling authority to nullify the power of a sister State to grant a divorce based upon a finding that one spouse had acquired a new domicil within

¹³⁹ *Ibid.*, at 254.

¹⁴⁰ Section 42.1, at 274-5.

the divorcing State, would, in a *proper functioning of our federal system, be equally indefensible*. . . . The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to grant divorces can be left to neither State. . . . The rights that belong to all States and *the obligations which membership in the Union imposes upon all*, are made effective because this Court is open to consider claims such as this case presents, that the courts of one State have not given full faith and credit to the judgment of a sister State that is required by Article IV, §1 of the Constitution.¹⁴¹

Safeguarding the proper functioning of the community of nations has been the function of the Law of Nations and, within it, the law of conflict of laws.¹⁴² Safeguarding the proper function of the community of states of the United States is the function of our present law of conflict of laws. Through the medium of the full faith and credit clause our law of conflict of laws has been connected with the ancient *ius gentium* which still lives in the Constitution to give the Supreme Court of the United States the power to make workable the otherwise unworkable full faith and credit clause.

3. There only remains the question of how it was possible that the ancient meaning of the term Law of Nations, and the fact of its incorporation into the full faith and credit clause could be forgotten.¹⁴³ To some extent the explanation can be found in that process of restrictive transformation of the Constitutional powers of the federal government which constitute the subject matter of Mr. Crosskey's work and which he has promised to describe in detail in those volumes which are still to come.¹⁴⁴ However, the phenomenon is also connected

¹⁴¹ 325 U.S. 226, 229, 232-3 (1945).

¹⁴² Cf. Savigny, *Private International Law*, Guthrie's transl. 69-70 (2d ed., 1880): Our "standpoint . . . is that of an international common law of nations having intercourse with one another, and this view has in the course of time always obtained wider recognition, under the influence of a common Christian morality, and of the real advantage which results from it to all concerned. In this way we came to apply to the conflict of territorial laws of independent states substantially the same principles which govern the collision of particular laws in the same state."

¹⁴³ That it was not entirely forgotten is indicated by the following language contained in an opinion of as recent a date as 1917: "[The] rule [that a judgment in personam in one state need not be credited in another without service of process on the defendant in the first action] became established long before the adoption of the 14th Amendment, as the result of applying fundamental principles of justice and the rules of international law as they existed among the states at the inception of the government." *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 401 (1917).

¹⁴⁴ "The present misconceptions are products, in the main, of the many attempts that have been made throughout our history to distort the Constitution to serve some political purpose. . . . Other instances of forgotten meaning are to be explained, however, rather upon the basis of prolonged disuse. . . . But the misunderstandings which are at once the most important and the least suspected are those wherein there have been added to these two factors of deliberate distortion and long disuse two other, purely fortuitous, elements of the highest potency. One of these is the radically changed usage, at the present day,

with a course of events of even farther reaching significance, viz., that transformation of the world which has occurred in connection with the rise of modern nationalism. It has been in the course of this development that the terms Law of Nations and International Law have come to assume their present narrow meaning, and that we have developed the idea that, except for the rules regulating the conduct of sovereign states toward each other, there can be no law other than that created by some particular state or nation.¹⁴⁵

This notion would not have been shared by lawyers and political thinkers of the last two thousand years, who steadfastly adhered to that view which was voiced by the classical Roman jurists that at least some part of the law is common to all men. To Gaius this "law of which all men make use"¹⁴⁶ appeared as dictated by natural reason, and this view continued to be held far into modern times, when it reached its culmination in the Natural Law school of the 17th and 18th centuries.

Even today we may doubt whether it is really impossible even to conceive of a law which is not the command of some particular sovereign or quasi-sovereign. Law ought, indeed, to have behind it "some definite authority." But why shall it not suffice that this authority through its courts, sheriffs and other enforcement officers backs the enforcement of certain rules. Why should it not be possible that the

of certain words that constitute the key, not only to the meaning of important provisions of the Constitution, but to the meaning of the eighteenth century pamphlet and newspaper literature about it. The other is a somewhat comparable change in various basic legal and political ideas which is not generally recognized to have occurred." Crosskey, *op. cit. supra* n. 108, at 4.

¹⁴⁵ This view has been characteristically expressed in the following statement of Mr. Justice Holmes: "Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticize them as right or wrong according to the writer's notion of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any court concerned. If there were such a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it." *Black and White Taxicab Co. v. Brown and Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928).

The same thought has found even more striking expression in the often quoted remark that "the common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917).

¹⁴⁶ Gaius, *op. cit. supra* n. 111.

rules thus enforced have their source in some convictions, traditions or customs which are common to the peoples and the courts of more than one sovereign or quasi-sovereign? Holmes' view, which has resulted in the far-reaching consequences of *Erie Railroad Co. v. Tompkins*¹⁴⁷ reduces all "common law" to "law held in common."¹⁴⁸

It has been in the course of this development that we have lost the ability even to conceive of a law which is not the command of some particular sovereign but rather a common law of supranational origin, extent, and validity.¹⁴⁹

The rise of the national states of Europe as sovereign nations can be traced to the 13th century. But it took a long time until nationalism could reach the strength to all but obliterate the feeling of unity that once had permeated all Christendom. It required that long chain of events which extends from the virtual collapse of the Holy Empire in the 13th century over the religious split of the Reformation, the substitution of the vernacular languages for the use of Latin and, later, French, as the *lingua franca* of the educated classes, to the appeal to nationalism through the French Revolution, the reaction to the Napoleonic conquests, the Romantic movement, 19th century imperialism, the 20th century world wars, and the anti-colonialist movements of recent decades. All these and many other events have contributed to obliterate the old notion of the unity not only of the culture of Christendom but also of its law. It was in this course of events that law be-

¹⁴⁷ 304 U.S. 64 (1938).

¹⁴⁸ The distinction between "common law" (*Gemeines Recht*) and "law held in common" (*Gemeinsames Recht*) has long been made in continental legal theory. "Law held in common" is law which, although enacted independently by the legislatures of several jurisdictions, is expressed in the same words. Common law, on the other hand is law which, based upon traditions, customs or convictions commonly shared is enforced by the courts of several mutually independent jurisdictions, but regarded, because of its common origin, as one and the same system of law. "Laws held in common" are our uniform state laws or, in Europe and Latin America, the uniform laws on bills of exchange and checks enacted in the several countries in pursuance of the Geneva Conventions of 7 June 1930 and 19 March 1931. Common law, on the other hand, was the Roman law of the *Usus modernus* as it was applied in the several German states before it was replaced on the first of January, 1900, by the new German Civil Code. Cf. *Enneccerus and Nipperdey, Lehrbuch des bürgerlichen Rechts, Allgemeiner Teil* (13th ed., 1931) § 41. I.

On the problem of the nature of the Common Law in the United States, see the acute critique of *Erie Railroad v. Tompkins* by Helen Silving, *Analogies Extending and Restricting Federal Jurisdiction*, 31 *Iowa L. Rev.* 330 (1946). See also Crosskey, *op. cit. supra* n. 108, esp. chapters XVIII and XIX, and Rheinstein, *Max Weber on Law in Economy and Society* 67 (1954).

¹⁴⁹ See note 53 *supra*. Goebel's disagreement with Crosskey's finding that in the late 18th century the Common Law was regarded as common law, seems to be essentially caused by the former's inclination even for the past to regard the Common Law as a law held in common.

came nationalized, in the double sense that in most nations local differences of statutes and customs were wiped out, and that the notion of a supranational common law was lost until nothing has been left of it but a narrow field of International Law in the rigid modern sense. Beyond this, nothing has survived except that reminiscence of a once different state of affairs which appears in the name of Private International Law,¹⁵⁰ and some occasional reminiscence of the former unity in the law of the seas.¹⁵¹

In "Private International Law" the old idea that it was "international" in the sense of a supranational common law survived far into the 19th century. But that idea vanished too, until conflicts law was established as strictly national law on a par with any other field of law.¹⁵² In its present state the world has not only some one hundred independent systems of substantive law but also of conflicts law. Any lawyer engaged in international legal matters knows what this state of affairs means.

In consequence of the United States Supreme Court's capitulation before the Austinian theory of the law not being capable of having any

¹⁵⁰ See pp. 805-6 *supra*.

¹⁵¹ Consult, for instance, *The Belgenland*, 114 U.S. 355 (1884): Claim for damages arising out of the collision on the high seas of a Belgian and a Norwegian ship. The plea that the United States had no jurisdiction was refuted by Mr. Justice Bradley as follows: "Although the court will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis iuris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged."

On the substantive law, the Court expressed itself as follows: "As to the law which should be applied in cases between parties, or ships, of different nationalities, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted."

¹⁵² This process of nationalization of the law of conflict of laws has been traced by Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 Col. L. Rev. 189 (1942). According to Nussbaum, the law-of-nations theory of private international law did both, arise and decline, during the 19th century. From the evidence presented in this article, it will be clear that that theory had its rise long before the 19th century. It is, indeed, as old as the law of conflict of laws itself, which was first developed as a part of the Roman Common Law by the Italian Glossators of the 12th and the Commentators of the 13th and 14th centuries, among whom Bartolus of Sassoferrato appears as the most prominent cultivator of the field. The name Private International Law may indeed have been used for the first time by Schaeffner, *Entwicklung des Internationalen Privatrechts* (1841) and Foelix, *Droit international privé* (1843). Consult Nussbaum, *op. cit. supra* at 195, n. 25. But it is significant that in 1832 Story spoke of *ius gentium privatum*, Story, *Conflict of Laws*, §§ 23-24 (2d ed., 1841). In his times, as it had been before, the law of conflict of laws was a part of the *ius gentium*, i.e., the Law of Nations.

source other than the command of some particular sovereign,¹⁵³ we are now faced with an analogous situation within the United States. In addition to the fifty-seven independent systems of state and territorial laws we have been regaled to fifty-seven independent systems of conflicts law.¹⁵⁴ But the ancient notion of a uniform common law in the field has been too stubborn to die. In spite of the almost exclusive dominance which the local law theory has obtained in this country, the notion has persisted that the states' jurisdiction to tax, to decide controversies and to regulate human conduct is in some way limited by a law common and thus superior to all. Properly this notion has been brought in contact with the full faith and credit clause of the Constitution. Only, in exactly what way this connection could be achieved could not be stated until the significance of the ancient *ius gentium* had been rediscovered by Mr. Crosskey.

This discovery does not, of course, mean that we are presently bound by those jurisdictional rules which were contained in the *ius gentium* of 1787. We would, indeed, be hard put even to state what in detail these rules were. What is significant is simply that at the time of the making of the Constitution of the United States the idea obtained that there existed a *ius gentium* in the sense of a legal order common to all Christendom and that this order imposed on all member nations the duty so to confine their legislative, judicial and other activities that all nations could live together in an orderly community. This notion was, as we have seen, regarded as constituting a part of the Constitution of the United States so that the member states could live together in an orderly union. This notion has been made a part and parcel of the full faith and credit clause, which would be meaningless without it. It is in the full faith and credit clause that the Supreme Court is to find the constitutional directive and authorization in detail to determine the spatial confines by which the powers of the several states are delimited against each other. It is also by the incorporation of the idea of the existence of a *ius gentium* in the full faith and credit clause that the Court must implement it so that the several states can harmoniously live and operate together in the framework of the national union. This foundation of the Supreme Court's power to define in detail the limits of state jurisdiction to legislate, to adjudicate and to tax is firm, and it is free from the doubts and troubles which had

¹⁵³ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁵⁴ *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941).

necessarily to arise whenever the Court tried to base its establishment of jurisdictional limitations upon the due process clause. It is only natural that all such attempts of the Court have been sporadic and unco-ordinated. To what extent the concept of procedural due process can be used for the purpose at all is doubtful, and resort to the concept of substantive due process has been discredited. Besides, the due process clause is meant to protect private persons against state power and has nothing to do with the different task of harmoniously co-ordinating within the federal union the competing and potentially conflicting powers of the several states. The full faith and credit clause gives the Supreme Court both the authority to perform this task and the policy directive as to the end toward which this authority is to be exercised. Only on such a basis is it possible to begin with the task to which Mr. Justice Jackson has challenged "the scholarship of our profession," the task of "finding wise answers on constitutional grounds to these questions."¹⁵⁵

IV

The problem which has been raised by the case of *Alton v. Alton*¹⁵⁶ has led us to the investigation of a general problem of far reaching significance. The specific problem of that case has not yet been answered, however. It is this: what is the effect within its own state of a statute in the enactment of which the state has overstepped the boundaries of its jurisdiction; also, what is the effect within the state of enactment, of a judicial decision rendered upon the basis of such a statute?

It is clear that a judgment is not only not entitled to full faith and credit but also void at home when it was rendered so that it deprives a person of life, liberty and property without due process of law.¹⁵⁷ Equally void is a statute insofar as it orders or authorizes such a judgment. But, as we have seen, a statute authorizing the granting of a consent divorce does not deprive any person of life, liberty or property.¹⁵⁸ Is such a statute void in the state of its enactment when it authorizes the granting of divorces beyond the state's sphere of jurisdiction as determined by the Supreme Court for purposes of the full faith and credit clause and when, consequently, a decree rendered under the statute is not entitled to recognition in other states? Were

¹⁵⁵ Jackson, op. cit. supra n. 34, at 29.

¹⁵⁶ 207 F. 2d 667 (C.A. 3d, 1953).

¹⁵⁷ *Pennoy v. Neff*, 95 U.S. 714 (1878).

¹⁵⁸ P. 780 supra.

*Jennings v. Jennings*¹⁵⁹ and *Alton v. Alton*¹⁶⁰ decided correctly? The answer does not follow automatically from the Supremacy Clause of Article VI, Section 2 of the Constitution. We assume that it is presently the "law of the land" that jurisdiction to grant a divorce does not belong to any state other than one in which at least one of the parties resides.¹⁶¹ A decree of divorce rendered by any state other than that of the residence of one of the parties need not be recognized by any other. But is it void in the state by which it was granted? Even if we were to say that by granting it the state has violated a constitutional command, we must remember that not every legal act done in violation of a prohibitory rule is void. The Romans aptly distinguished between *lex perfecta*, *lex imperfecta*, and *lex minus quam perfecta*,¹⁶² as we distinguish between laws which are mandatory and others which are directory only.¹⁶³ Only in the case of the former is the act done in violation of it legally null and void. The conclusion of a contract may be prohibited in the sense of being punishable, and yet be valid.¹⁶⁴ The

¹⁵⁹ 251 Ala. 73, 36 So. 2d 236 (1948).

¹⁶⁰ 207 F. 2d 667 (C.A. 3d, 1953).

¹⁶¹ Pp. 775, 779 *supra*.

¹⁶² (1) *Leges aut perfectae sunt aut imperfectae aut minus quam perfectae. Perfecta lex est, quae vetat aliquid fieri, et si factum sit, rescindit; qualis est lex. . . . Imperfecta lex est, quae vetat aliquid fieri, et si factum sit, nec rescindit nec poenam iniungit ei, qui contra legem fecerit; qualis est lex Cincia, quae plus quam . . . donari prohibet, exceptis quibusdam personis velut cognatis, et si plus donatum sit, non rescindit. (2) Minus quam perfecta lex est, quae vetat aliquid fieri, et si factum sit, non rescindit, sed poenam iniungit ei, qui contra legem fecit; qualis est lex Furia testamentaria, quae plus quam mille assium legatum mortis causa prohibet capere, praeter exceptas personas, et adversus eum, qui plus ceperit, quadrupli poenam constituit.*" Tit. ex corp. Ulpiani 1, cited after Arangio-Ruiz e Guarino, *Breviarium Iuris Romani* 445 (new ed., Milan 1951). [(1) Laws are either perfect, or imperfect, or less than perfect. A perfect law is one which prohibits something to be done and invalidates what has been done in spite of the prohibition. Such for instance is (the rest of the passage has not been preserved). An imperfect law is one which prohibits something to be done, but neither invalidates what has been done in spite of the prohibition nor imposes any punishment upon the one who has acted against the law. Of this kind is the lex Cincia, which prohibits that a donation be made beyond a certain value to any person who is not excepted from that rule, such as certain relatives. If a donation surpasses the amount, it is nevertheless valid. (2) A less than perfect law is one which prohibits something to be done, does not invalidate what has been done against the prohibition, but imposes punishment upon the one who has acted against the law. Of this kind is the Lex Furia (concerning wills); it prohibits that anyone other than certain persons receive a legacy of more than 1,000 asses, and imposes upon him who has nevertheless accepted such a legacy, a penalty of four times the amount.]

¹⁶³ Cf. Lord Campbell in *Liverpool Borough Bank v. Turner*, 2 De G. F. & J. 502, 507-8 (1860): "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

¹⁶⁴ Cf. *Vita Food Products, Inc. v. Unus Shipping Co.*, [1939] A. C. 277, 293-94; *John E. Rasasco Creameries, Inc. v. Cohen*, 276 N.Y. 274, 11 N.E. 2d 908 (1937).

law prohibits the conclusion of various kinds of marriages, and yet may treat such marriages as valid if they have been concluded nevertheless.¹⁶⁵ A sovereign state may be prohibited by treaty or by a general rule of International Law from enacting a statute of a certain kind, but the statute enacted nevertheless is valid at least as far as the state's own internal agencies are concerned.¹⁶⁶ Is the prohibition not to grant divorces to any persons other than residents (and their spouses) of the same character as such a rule of International Law?

At the outset we must recognize that a power to regulate legislative and judicial jurisdiction includes the power to deprive an act of prohibited exercise of jurisdiction of all legal effect. However, does the federal regulation of state jurisdiction necessarily mean any more than a release of the other states from the duty to give faith and credit

¹⁶⁵ Cf. *Needam v. Needam*, 183 Va. 681, 33 S.E. 2d 288 (1945); *Meister v. Moore*, 96 U.S. 76 (1877); *Payne v. Payne*, 54 App. D.C. 149, 295 Fed. 970 (1924).

¹⁶⁶ Cf. *Permanent Court of International Justice, Germany v. Poland, Case of the Factory at Chorzow*.

By a convention concluded in Geneva on 15 May 1922 [16 *Martens, Nouveau recueil général* (3. ser.) 645], Poland had undertaken not to expropriate certain kinds of property, owned by nationals of Germany and situated in that part of Upper Silesia which was ceded by Germany to Poland under the Treaty of Versailles and the decision of the Conference of Ambassadors, given in Paris on 20 October 1921. Under a law of the Polish Diet, enacted on 14 July 1920 (*Dziennik Ustaw* 1920, no. 400), and extended to Polish Upper Silesia by law of 16 June 1922 (*Dziennik Ustaw* 1922, no. 388), the Polish court in Katowice decreed that title to certain industrial plants in Upper Silesia had vested in the Polish Republic, and the government of the Polish Republic took over possession and management of the factories. Germany applied to the Permanent Court of International Justice to declare that by its measures Poland had violated the Geneva Convention of May 15, 1922. The Court so found. In the course of the proceedings the Polish government had objected to the power of the Court "to deal with the Polish law of July 14, 1920." To this objection, the Court replied as follows: "This . . . does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures." (Judgment No. 7, of 25 May 1926, *Permanent Court of International Justice, Ser. A. No. 7*, p. 4, at p. 18; 1 *Hudson, World Court Reports* 521.)

When the Court had, by its Judgment No. 7, declared that Poland, by enacting and applying her laws of 1920 and 1922, had violated International Law as determined by the Geneva Convention of 15 May 1922, Germany applied to the Court to order Poland to pay an indemnity, and to fix the amount. In the course of these proceedings Poland maintained that no damage had been suffered because the Court in Katowice had held that, upon the basis of the Polish statutes, the plant in question belonged to the Polish Republic. The Court passed over the objection by the following observation: "Whatever the effect of the judgment . . . may be at municipal law, this judgment can neither render in-existent the violation of the Geneva Convention recognized by the Court in Judgment No. 7 to have taken place, nor destroy one of the grounds on which that judgment is based." (Judgment No. 13, of 13 September 1918, *Permanent Court of International Justice, Series A, No. 13*, p. 4, at p. 33; 1 *Hudson, World Court Reports* 667.)

The Court thus held in effect that International Law was violated precisely because Poland had enacted a statute which was valid as far as Polish law was concerned.

to the "offending" state's statute and judicial proceeding? Our tradition has been characterized by such tender regard for state's rights that we cannot easily assume the existence of a grave limitation of state power where the situation is sufficiently ambiguous to allow a milder interpretation. What reason should there be for federal power to invalidate the state's act as to its internal effects?

In the special context of divorce one must also remember that the Supreme Court itself has ascribed a certain validity even outside of the state where it was rendered to a decree of divorce in which the jurisdictional fact of residence has been ascertained, although perhaps erroneously, provided both parties have participated in the proceedings.¹⁶⁷ What reason could there thus be for applying the heavy sanction of invalidating as to its intra-state effects a statute extending a state's claim to grant divorces which need not be given faith and credit in other states? The only reason of which one might think is the inconvenience which might accompany a so-called limping marriage,¹⁶⁸ i.e., a marriage which is treated as existing in some state or states and as not existing in others. If a decree of divorce rendered in state A under circumstances analogous to those of *Alton v. Alton* is effective in state A and not entitled to faith and credit in other states, the parties are no longer husband and wife in state A, but may still be treated as married to each other outside of that state. This situation would, indeed, be awkward, and, since the state A decree would not contain a finding of residence, the awkward effect could not be eliminated by the application of the rule of *Sherrer v. Sherrer* and *Johnson v. Muelberger*.¹⁶⁹ But is that result so serious as to allow us to attach to a state statute the grave sanction of nullity when it is not clearly compelled by a rule of constitutional law? In consequence of the diversity of the laws of different nations, limping marriages are by no means rare.¹⁷⁰ A holding that the statute is invalid would contradict the consistent line of cases in which the Supreme Court has held that a state statute must be treated as valid until its invalidity has been clearly demonstrated.¹⁷¹

¹⁶⁷ *Davis v. Davis*, 305 U.S. 32 (1938); *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Coe v. Coe*, 334 U.S. 378 (1948); *Johnson v. Muelberger*, 340 U.S. 581 (1951).

¹⁶⁸ *Matrimonium claudicans*.

¹⁶⁹ See authorities cited *supra* note 166.

¹⁷⁰ See 1 *Rabel, Conflict of Laws* 420-1 (1945).

¹⁷¹ See *O'Gorman and Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931); *United States v. Caroline Products Co.*, 304 U.S. 144, 152 (1938); *Thomas v. Collins*, 323 U.S. 516, 529 (1945); cf. *Hamilton and Braden, The Special Competence of the Supreme Court*, 50 *Yale L. J.* 1319 (1941); *Comments*, 31 *Col. L. Rev.* 1136 (1931), 36 *Col. L. Rev.* 283 (1936), 45 *Ill. L. Rev.* 274 (1950).

It would also be contrary to the utterances of those Justices of the Supreme Court who have addressed themselves to the problem. The first occasion to do so arose in *Haddock v. Haddock*,¹⁷² where it was held that an ex parte divorce obtained in a state other than that of the matrimonial domicile was not entitled to full faith and credit. As to the effect of the decree in the state in which the divorce had been obtained, Chief Justice White had this to say:

In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the State of Connecticut within its borders to give effect to the decree of divorce in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that State.¹⁷³

The Chief Justice also referred to the case of *Maynard v. Hill*¹⁷⁴ in which the intra-state validity of the divorce granted by the legislature of Washington was taken for granted although Washington was not the matrimonial domicile as defined in *Haddock v. Haddock*.

The view expressed by Chief Justice White had already been expressed by Bishop,¹⁷⁵ but was viewed sceptically by Professor Beale in his article on *Haddock v. Haddock Revisited*¹⁷⁶ as well as in his treatise on the Law of Conflict of Laws.

In *Haddock v. Haddock* it was clear that at least one of the parties was a resident of the state where the divorce was granted, even though that state was not at the time the matrimonial domicile. *Williams v. North Carolina I*¹⁷⁷ was decided by the Court on the assumption that the divorce plaintiffs had been residents of the divorcing state, Nevada. In his dissent Mr. Justice Jackson did not regard it as relevant whether or not the divorce plaintiffs were residents of Nevada. He regarded the parties' ties with North Carolina as too strong to compel that state to recognize the Nevada divorces. But he was anxious to emphasize that such non-recognition would not detract from the validity of the decrees for purposes of Nevada law. In this connection he said:

To hold that the Nevada judgments are not binding in North Carolina because they are rendered without jurisdiction over the North Carolina spouses, it is not necessary to hold that they are without any conceivable validity. It may be, and

¹⁷² 201 U.S. 562 (1906).

¹⁷³ *Ibid.*, at 572.

¹⁷⁴ 125 U.S. 190 (1888).

¹⁷⁵ 2 Marriage and Divorce § 133 (6th ed. 1881): "If a court, under command of its own government, takes a jurisdiction not rightful by the general principles of law as held among civilized nations, its judgment will be binding at home, but null abroad."

¹⁷⁶ 39 Harv. L. Rev. 417 (1926).

¹⁷⁷ 317 U.S. 287 (1942).

probably is, true that Nevada has sufficient interest in the lives of those who sojourn there to free them and their spouses to take new spouses without incurring criminal penalties under Nevada law. I know of nothing in our Constitution that requires Nevada to adhere to traditional concepts of bigamous union or the legitimacy of the fruit thereof. And the control of a state over property within its borders is so complete that I suppose Nevada could effectively deal with it in the name of divorce as completely as in any other.¹⁷⁸

The same position was taken by the other dissenter, Mr. Justice Murphy, who added that "there is an element of tragic incongruity in the fact that an individual may be validly divorced in one state but not in another. But our dual system of government and the fact that we have no uniform laws on many subjects give rise to other incongruities as well."¹⁷⁹

In *Williams v. North Carolina II*,¹⁸⁰ when it had been found by the North Carolina courts that none of the parties to the Nevada divorces had been residents of that state, North Carolina was permitted to refuse faith and credit to the Nevada decrees. The question of whether or not these decrees were valid for purposes of Nevada was not taken up in the opinion which was delivered for the Court by Mr. Justice Frankfurter.¹⁸¹ In his separate concurring opinion, Mr. Justice Murphy expressly declared Nevada entitled to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. "It is entitled," he continued, "moreover to give to its divorce decrees absolute and binding finality within the confines of its borders."¹⁸² Mr. Justice Rutledge, also dissenting, emphasized that "the Court was careful not to say that Nevada's judgment is not valid in Nevada"¹⁸³ and then stated that "the necessary conclusion follows that the Nevada decree was valid and remains valid within its borders."¹⁸⁴

In *Haddock v. Haddock*,¹⁸⁵ as well as in the two cases of *Williams v. North Carolina*,¹⁸⁶ it was not necessary to decide whether or not a decree of divorce which is not entitled to faith and credit outside of the state where it was rendered, is valid within that state. The first case in which this question was squarely raised before a federal court was *Sutton v. Leib*.¹⁸⁷ A resident of Illinois had obtained in Nevada a

¹⁷⁸ *Ibid.*, at 319.

¹⁷⁹ *Ibid.*, at 311.

¹⁸⁰ 325 U.S. 226 (1945).

¹⁸¹ It is hard to see how Mr. Justice Black could refer in his dissenting opinion to "the Court's holding the Nevada decrees were void." *Ibid.*, at 270.

¹⁸² *Ibid.*, at 239.

¹⁸⁴ *Ibid.*, at 247.

¹⁸³ *Ibid.*, at 246.

¹⁸⁵ 201 U.S. 526 (1906).

¹⁸⁶ 317 U.S. 287 (1942); 325 U.S. 226 (1945).

¹⁸⁷ 188 F. 2d 766, 768 (C.A. 7th, 1951).

divorce which was held by the Court of Appeals for the Seventh Circuit not to be entitled to faith and credit outside of Nevada. However, the party's remarriage in Nevada was nevertheless held to be valid because for purposes of Nevada law the Nevada divorce was effective.¹⁸⁸

In contrast to this view of the United States Court of Appeals for the Seventh Circuit stands the decision of the Supreme Court of Alabama in *Jennings v. Jennings*,¹⁸⁹ which declared invalid a statute of Alabama,¹⁹⁰ which had provided that it was unnecessary for the plaintiff in an action for divorce to have been a bona fide resident of the state for one year next before the filing of the bill "where the Court has jurisdiction of the parties."¹⁹¹ Under this statute it would have been possible in Alabama to obtain a divorce for non-residents if the plaintiff submitted to personal jurisdiction by filing his bill in a court of the state, and the defendant by entering an appearance. Considering the Supreme Court cases in which it was said that residence of at least one party is necessary to give a state jurisdiction to grant a divorce, the Supreme Court of Alabama concluded that "the legislature of a state cannot confer on the courts of that state a power which is not within the power of the state to confer on the legislature." The Court failed to consider that all the Supreme Court cases were exclusively concerned with the problem of faith and credit to be ascribed to a decree of divorce by a state other than that by whose court it was granted. The court simply concluded that lack of jurisdiction was lack of jurisdiction without considering that lack of jurisdiction can exist in one respect but not in another. This kind of "lump concept thinking" has not only been criticized by prominent legal scholars,¹⁹² but has also been discarded

¹⁸⁸ The reversal of the decision by the Supreme Court, 342 U.S. 402 (1951), was based upon other grounds and left unaffected the Court of Appeals' holding on the intra-Nevada validity of the Nevada divorce.

¹⁸⁹ 251 Ala. 73, 36 So. 2d 236 (1948).

¹⁹⁰ Compare text at p. 781 *supra*.

¹⁹¹ General Acts 1945, p. 691, approved July 6, 1945. As amended by this Act, § 29, Title 34, Code of 1940 was to read as follows: "When the defendant is a non-resident, the other party to the marriage must have been a bona fide resident of this state for one year next before the filing of the bill, which must be alleged in the bill and proved; provided, however, the provisions of this section shall not be of force and effect when the Court has jurisdiction of both parties to the cause of action."

¹⁹² See Llewellyn, *Cases and Materials on the Law of Sales* 561 (1930); W. W. Cook in 3 A. L. I. Proceedings 226-31 (1925); Cook, *The Logical and Legal Bases of the Conflict of Laws*, c. VII (1942). Bingham, *The American Law Institute v. The Supreme Court In the Matter of Haddock*, 21 Cornell L.Q. 393 (1936). This last named article states a refreshingly clear approach to the problem of divorce decrees not entitled to full faith and credit. It has apparently influenced the Supreme Court in the case of *Estin v. Estin*, 334 U.S. 541 (1948).

by the Supreme Court in connection with the very problem of divorce, when it held, in *Estin v. Estin*,¹⁹³ that a decree of divorce could bring about the dissolution of a marriage insofar as the parties to the marriage were granted the freedom of remarriage, but leave unaffected the duty of one of the parties to pay marital support to the other. In its opinion in *Alton v. Alton*, the Court of Appeals for the Third Circuit has attempted a more careful and more discriminating justification of the view that a decree of divorce which is not entitled to full faith and credit is also invalid in the state in which it is rendered, and that a statute purporting to authorize such a decree is invalid. However, the basis of such invalidity is sought in the due process clause of the 14th Amendment, a clause which, as we have seen, is not applicable unless a person is being deprived of life, liberty or property. Since there cannot be found any other clause of the Constitution from which the invalidity of such a statute can be derived, it should, in accordance with traditional policy, be held valid insofar as there are concerned its binding effect upon the courts of the state of its enactment, and the effects, within that state, of a decree rendered upon the basis of such statute.

¹⁹³ 334 U.S. 541 (1948).